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160 U.S. 357

160-357.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 712.—OCTOBER TERM, 1893.

EDWARD B. BARTLETT *et al.*,
Plaintiffs in Error,

vs.

WILLIAM LOCKWOOD AND EMORY W. McCLINTOCK,
Defendants in Error.

NOTICE OF MOTION AND BRIEF ON PART OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR, ETC.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for ~~Plaintiffs~~ Defendants in Error.
FRANCIS LYNDE STETSON,
CHARLES W. BANGS,
Counsel for Defendants in Error.

Evening Post Job Printing House, New York.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

EDWARD B. BARTLETT *et al.*, Plaintiffs in Error, AGAINST WILLIAM LOCKWOOD and EMORY W. MCCLINTOCK, Defendants in Error.	October Term, 1893. No. 712.

William Lockwood and Emory W. McClintock, the defendants in error above named, now come and move the Supreme Court of the United States, upon the annexed brief and notice of motion, to dismiss the writ of error to the Supreme Court of the State of New York, sued out from this Court, to review the final judgment of the said Supreme Court of the State of New York in the suit or action pending in the said Supreme Court, wherein the said William Lockwood and Emory W. McClintock were plaintiffs, and the said Edward B. Bartlett, Albert C. Woodruff and Henry Nitchie were defendants, entered in the said Supreme Court of the State of New York on the 10th day of February, 1892, for the sum of $3,914.05, with interest from June 13, 1887, on the ground that the Supreme Court of the United States has not jurisdiction to re-examine or reverse the said judgment of the Supreme Court of the State of New

York, or the judgment or decision of the Court of Appeals of the State of New York upon which the said judgment of the Supreme Court of the said State was founded, for the reasons that in the said final judgment or decree or decision of the Court of Appeals of the State of New York, or of the Supreme Court of the said State, there was not drawn in question the validity of a statute of, or of an authority exercised under the United States, and the decision of the said Courts was not against the validity of any such statute or authority; and that in the said final judgment or decree or decision of the Court of Appeals or the Supreme Court of the State of New York, there was not any decision against any title, right, privilege or immunity, specially or otherwise set up or claimed by the plaintiffs in error above named, under any statute of or commission held or authority exercised under the United States.

And they also move to affirm the said judgment on the ground that it is manifest that the writ of error herein was taken for delay only; and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

And the defendants in error also move for damages for delay, as provided in Subdivision 2, Rule 23, of the Supreme Court.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendants in Error.

United States Supreme Court.

IN ERROR TO SUPREME COURT OF THE STATE OF NEW YORK.

EDWARD B. BARTLETT *et al.*, Plaintiffs in Error, vs. WILLIAM LOCKWOOD *et al.*, Defendants in Error.	No. 712, October Term, 1893.

Please take notice that we shall move before the Supreme Court of the United States at the court room of said Court, at the Capitol, in the City of Washington, D. C., on Monday, the second day of April, 1894, at the opening of the Court on that day, upon the printed transcript of record in this case, and upon the brief of which a copy is herewith served upon you, to dismiss the writ of error to the Supreme Court of the State of New York, sued out or issued in this case to review the final judgment of the said Court in this action, or to affirm the judgment therein, on the grounds and as provided by Rule 6 of the Court, or for such other order or direction as may be proper in the premises.

Dated March 8, 1894.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendants in Error,
15 Broad Street, New York.

To Messrs. GOODRICH, DEADY & GOODRICH,
Attorneys for Plaintiffs in Error,
59 Wall Street, New York.

United States Supreme Court.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

EDWARD B. BARTLETT *et al.*, Plaintiffs in Error,	No. 712.
vs.	October Term, 1893.
WILLIAM LOCKWOOD and EMORY W. MCCLINTOCK, Defendants in Error.	

BRIEF FOR DEFENDANTS IN ERROR.

Upon Motion to Dismiss Writ of Error from Supreme Court of the United States to Supreme Court of the State of New York.

This action was originally brought in the Supreme Court of the State of New York, in New York County, by the defendants in error here, composing the firm of "Lockwood & McClintock," against the plaintiffs in error, who were members of the firm of "E. B. Bartlett & Co.," with whom was also impleaded one William M. Smith, who was designated as a defendant and sued or named in the action solely as an individual, but who was described in the complaint and alleged to be, at the time of the transac-

tions out of which the cause of action arose, "Health Officer of the Port of New York."

The action was brought to recover damages for the alleged unlawful taking, detention and injury to certain cargoes of rags imported by the plaintiffs and which were their property, which were alleged to have been unlawfully taken possession of by the defendants and retained until certain charges and expenses were paid, which the plaintiffs claimed to be illegal; and that the taking, detention and injury were brought about by a conspiracy between Smith and Bartlett & Co.

The transactions complained of and alleged, so far as Smith was concerned, were committed by him while acting as such Health Officer, though claimed to be outside of his authority and in violation of his duty as such.

It was alleged in the complaint that he (Smith), as such Health Officer, "had charge and control over "vessels and the cargo and other property contained "therein coming into said port of New York, from "foreign ports" (fol. 566, p. 396).

It was further alleged that the plaintiffs "Lockwood & McClintock," had imported a quantity of rags (2,920 bales from Japan in the ship *Vigilant*, which arrived at the port of New York on or about May 30, 1885; and 150 bales in the *Battaglia* from Leghorn, which arrived about June 5, 1885), and that the plaintiffs "were justly entitled to the "possession and control of said rags, and would "have had the same except for the wrongful acts "and conduct of the defendants," as further alleged in the complaint (fol. 565, p. 396).

It was then alleged that Smith (the Health Officer of the port), with intent to wrong and injure the plaintiffs, had wrongfully and unlawfully conspired and combined with Bartlett & Co. to have the rags condemned as unclean and infectious, and to require them to be disinfected by Bartlett & Co., under a pretended process controlled by them, so that Bartlett & Co. would be able to

hold the goods until the charges for such disinfection were paid; and that Smith, under color of his office as Health Officer, wrongfully and unlawfully caused the plaintiffs' rags to be taken from the vessels upon which they arrived and transferred to the place of business of Bartlett & Co. for the pretended purpose of having the same disinfected; and that by reason of said unlawful conspiracy and acts of the defendants the rags were wrongfully taken by Bartlett & Co., and kept and held by them from June 5 to October 1, 1885, and were partially subjected to a pretended process of disinfection, which was worthless, and greatly injured and damaged the rags, but which was fraudulently approved by Smith, with intent to give Bartlett & Co. the control of the pretended disinfection of the rags, so that they might charge and extort from plaintiffs large sums of money for such so-called disinfection; that the rags were in fact clean and free from any infectious matter, and were not at all dangerous to health and did not require to be disinfected, as Smith and Bartlett knew (fols. 566 and 567, p. 396).

The plaintiffs protested against the wrongful taking of the rags and the conduct of the defendants, and demanded possession of the rags, which the defendants refused to deliver until the charges of transfer and pretended disinfection were paid; and by reason of said *wrongful acts* by Smith and Bartlett & Co. the plaintiffs suffered damages, for which they demanded judgment against the defendants (fol. 567, p. 397).

The answer of the defendants, composing the firm of E. B. Bartlett & Co., consisted of a general denial of the charges of the complaint as to the alleged conspiracy between themselves and the Health Officer, and as to the acts charged against them, or the character of those acts (fols. 568-9, p. 397).

They admitted that the defendant Smith was at the times named Health Officer of the Port of New York, "but denied that he had full charge

"and control over vessels and cargoes coming into "said port, except as authorized by the statutes "of the State of New York, and the regulations "of the United States and the port of New York" (fol. 569, p. 398).

The answer of the defendant Smith is not material, because, upon the trial, the action was dismissed or the jury disagreed as to him (fol. 467, p. 335, fol. 469, p. 336, and fol. 574, p. 400), and there was no appeal by the plaintiffs.

But it may be said that he nowhere set up or claimed by his answer, any authority or right under or by virtue of any statute or law of the United States, or of any authority exercised under the United States (pp. 399–400, fols. 571–2); and certainly the defendants Bartlett & Co. did not.

Dr. Smith, the Health Officer, justified all his actions in the premises as in the exercise of the powers and duties of his office as Health Officer, and not otherwise, under and pursuant to the laws, rules and regulations duly established and in force in the port of New York, governing quarantine and the admission of merchandise, &c.; and that he acted as such officer and not otherwise, with due and proper judgment and discretion, "with due regard to the sanitary conditions of the port" (fols. 571–2–3, pp. 399, 400).

It will thus be seen that so far as the pleadings in the action are concerned, the validity of no statute of the United States, nor the validity of any authority exercised under the United States, was drawn in question; nor was any title, right, privilege or immunity set up or claimed, specially or otherwise, under any statute or commission held, or authority exercised, under the United States.

Neither of the defendants sought to justify, by their answers, any of their acts in the premises under or by virtue of any statute of the United States, or of any authority exercised under the

United States; nor did they set up or claim any title, right or privilege under any statute, or commission held, or authority exercised, under the United States.

No party to the action was an officer of the United States.

The action was tried at the Supreme Court, Circuit, New York, where such actions are triable in the State Court, on April 18 to 29, 1887, before the Court and a jury; and a verdict was rendered for the plaintiffs as against the defendants, Bartlett, Woodruff and Nitchie (who composed the firm of E. B. Bartlett & Co.) for $8,000 (fol. 574, p. 400).

The jury disagreed as to the defendant Smith, and were discharged (fol. 469, p. 33, and fol. 574, p. 400).

Upon this verdict a judgment was entered against Bartlett, Woodruff and Nitchie, in favor of the plaintiffs for $8,660.55 damages and costs, the $660.55 being costs (fol. 575, pp. 400-401).

From this judgment the defendants Bartlett, Woodruff and Nitchie appealed to the General Term of the New York Supreme Court (fol. 576, p. 401).

Upon that appeal, heard before three Judges, the Court directed that upon the plaintiffs stipulating to reduce the original judgment in the sum of $1,675.16, the judgment as to the balance be affirmed, without costs; and in case no such stipulation was given, the judgment be reversed and a new trial ordered (fol. 578, p. 402).

The stipulation was given, and the judgment was reduced accordingly (fol. 579), and as reduced affirmed.

The defendants Bartlett & Co. appealed from this last judgment to the Court of Appeals of the State of New York (fol. 580, p. 403), and that Court ordered and directed that the judgment should be reversed

and a new trial granted, unless plaintiffs stipulated to reduce the recovery of damages to $3,182.50; and in that event, the judgment be so modified, and as modified, affirmed, without costs (p. 7).

Upon that decision, the case and record being remitted to the N. Y. Supreme Court, the judgment of the Court of Appeals was made the judgment of the Supreme Court (fol. 591, p. 409), pursuant to the practice in the State Court (fols. 589 to 591, pp. 408 and 409); and the plaintiffs having given the stipulation required by the judgment of the Court of Appeals (fol. 591, p. 409), and the plaintiffs' costs in the original judgment having been somewhat reduced in consequence of the reduction of the judgment (p. 411, fols. 594, 595), judgment was entered against Bartlett & Co. in favor of the plaintiffs, on February 10, 1892, for $3,914.05, with interest from June 13, 1887 (fol. 595, p. 411).

To review this judgment the defendants Bartlett & Co., plaintiffs in error here, sued out a writ of error from the United States Supreme Court to the Supreme Court of the State of New York; the writ of error having been allowed by the Chief Justice of the New York Supreme Court in the First Department (pp. 1, 3 and 4), the same Justice who gave the decision of the General Term of the supreme Court in the case affirming the judgment with the modification stated.

Upon the application to the Court for the writ of error, and citation, the plaintiffs in error filed the following assignments of error in the New York Supreme Court, upon which the appeal or writ of error was allowed (fols. 609, 610 and 611, pp. 419 and 420).

"SUPREME COURT, NEW YORK COUNTY."

"WILLIAM LOCKWOOD and another"

AGAINST

"EDWARD B. BARTLETT and others."

"The defendants herein assign the following errors herein:"

"FIRST.—That the judgment awards to the plaintiffs' damages to the amount of $3,914.05 and interest from the 13th day of June, 1887, and each and every part thereof."

"SECOND.—That the Court held that under the Statutes of the United States the United States Government had no right to order the disinfection of the plaintiffs' rags."

"THIRD.—That the Court held that under the Statutes of the United States the Treasury Department had no right to order the disinfection of the plaintiffs' rags."

"FOURTH.—That the Court held that under the Statutes of the United States that the Collector of the Port of New York had no right to order the disinfection of the plaintiffs' rags."

"FIFTH.—That the Court held that the rags were not disinfected by the authority and under the order of the United States Government or the Treasury Department, or the Collector of Customs of the Port of New York."

"SIXTH.—That the Court held that the rags by the ship *Vigilant*, although ordered by the Collector to be sent to the bonded warehouse of E. B. Bartlett & Co. for disinfection, were not disinfected by the orders of the Health Officer of the Port of New York."

"SEVENTH.—That the Court held that the rags by the ship *Battaglia*, although ordered by the Collector to be sent to the bonded warehouse of E. B. Bartlett & Co. for disinfection, were not disinfected by the orders of the Health Officer of the Port of New York."

"EIGHTH.—That the Court held that a specific order from the Health Officer of the Port of New York for the disinfection of the particular goods on the *Vigilant* was necessary, inasmuch as it appears by the evidence that general orders were given by him for the disinfection of all such goods, and that under such order the rags by the *Vigilant* were disinfected without specific orders as to that particular cargo."

"NINTH.—That the Court held that a specific order from the Health Officer of the Port of New York for the disinfection of the particular goods on the *Battaglia* was necessary, inasmuch as it appears by the evidence that general orders were given by him for the disinfection of all such goods, and that under such order the rags by the *Battaglia* were disinfected without specific orders as to that particular cargo."

"TENTH.—That the Court did not hold that the rags upon the *Battaglia* were sent to Robbins Reef, and there disinfected by the order of the Collector of the Port of New York and the order of the Health Officer of the Port of New York."

"ELEVENTH.—That the Court did not hold that the certificate given by the Health Officer of the Port of New York was a direct order for the disinfection of the rags by the *Battaglia*."

"TWELFTH.—That the sum of $3,182.50 for which the judgment was entered, contains two items for disinfection, namely:

Disinfecting 2,920 bales of rags by the *Vigilant* at $5 per ton	$2,920 00
Disinfecting 150 bales of rags by the *Battaglia* at $5 per ton	262 50
	$3,182 50

and that as it appears that a deduction of $750 was made by E. B. Bartlett & Co. upon the above amount at the time of the payment of the bills upon the two vessels, the judgment is $750 greater than should have been allowed."

The defendants in error now move, under Rule 6 of this Court, to dismiss the writ of error issued in this case, on the ground that the United States Supreme Court has not jurisdiction to re-examine or review the final judgment of the Court of Appeals or of the Supreme Court of the State of New York in this case.

And upon this motion the defendants in error submit the following brief and points.

First.

The right to a writ of error from the Supreme Court of the United States to the State Court is dependent upon the provisions of Section 709 of the United States Revised Statutes.

The only material part of the section which can be claimed to apply to this case, is as follows:

"Sec. 709. A final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or of an authority exercised under the United States, and the decision is *against their validity;* * * * or where any title, right, privilege or immunity is claimed under any statute or commission held, or authority exercised under the United States, and the decision is *against* the title, right, privilege or immunity specially set up or claimed under such statute, commission or authority, may be re-examined and re-

versed or affirmed in the Supreme Court upon a writ of error."

I.

The assignments of errors in the case, so far as they pretend to raise any questions which might by any possibility be claimed to come within the statute, are the 2d, 3d, 4th, 5th and 10th.

The 1st, 6th, 7th, 8th, 9th, 11th and 12th assignments of error do not raise any question arising under any statute of the United States, either as to the validity of any such statute, or of an authority exercised under the United States; nor any question as to any right, privilege or immunity claimed under any statute, or commission held, or authority exercised under the United States.

II.

The 2d assignment of error is "that *the Court* held that under the statutes of the United States the United States Government had no right to order the disinfection of the plaintiffs' rags." If by the words "*the Court*" is meant the N. Y. Court of Appeals, the highest Court of the State in which a decision was had, the Court did not so hold. The question whether the United States Government had the right to order the disinfection of plaintiffs' rags was not in the case. It was not an issue and was not litigated; and there was no claim or pretense that the United States Government did order the disinfection of plaintiffs' rags.

III.

The 3d assignment of error is "that the Court held that under the statutes of the United States the Treasury Department had no right to order the disinfection of plaintiffs' rags."

The Court of Appeals did not so hold. There was no such question raised by the pleadings in the case, and it did not arise, except incidentally. The Treasury Department did not so order.

IV.

The 4th assignment of error is, "that the Court held that under the statutes of the United States the Collector of the Port of New York had no right to order the disinfection of the plaintiffs' rags."

The same thing is to be said of this assignment or error.

V.

The 5th assignment of error contradicts the three previous ones (the 2d, 3d and 4th).

It is, "that the Court held that the rags were *not* disinfected by the authority and under the order of the United States Government, or the Treasury Department, or the Collector of Customs of the Port of New York."

This is inconsistent with the previous assignments of error. If this is so—if the Court did so hold as stated in this assignment of error—it could not have held as stated in the previous assignments, that under the statutes of the United States neither the United States Government, or the Treasury Department, or the Collector of the Port of New York *had any right to order the disinfection of the plaintiffs' rags.*

(1.) The questions whether the United States Government, the Treasury Department, or the Collector of the Port of New York *had any right* to order the disinfection of the plaintiffs' rags could not arise, if, as stated in this assignment of error, the Court held that the rags were *not* in fact disinfected by authority or under the order either of the Government, the Treasury Department, or the Collector.

(2.) This assignment of error relates to a question *of fact* and not one of law. Whether the rags were or were not disinfected by authority, or under order of the Government, or the Treasury Department, or

the Collector, was a *question of fact*, which the United States Supreme Court will not review.

It is not a question as to the validity of an authority exercised under the United States, or of a statute of the United States.

VI.

The 10th assignment is similar to the 5th, limited, however, to only a certain part of the rags. It is equally inconsistent with the 2d, 3d and 4th, and raises a question of fact and not of law. It is altogether bad.

The 6th assignment of error is also similar to the 5th; and assigns an error of fact, and not a decision against the validity of a Federal law or of an authority exercised under it.

VII.

The other assignments of error do not raise, or state even, any question arising under any law or statute of the United States, or any questions of which the Supreme Court can take cognizance or review.

They do not state that the State Court decided any question against the validity of any statute or authority exercised under the United States, or against any right, privilege or immunity claimed under any statute, or authority exercised under the United States, or that any such statute or authority was drawn in question.

Nor are either the 2d, 3d, 4th, 5th or 10th assignments of error even, in their terms, within the provisions of Section 709 R. S., U. S. They do not in terms state any errors within the provisions of that section.

There is no allegation in any of them that in any judgment in the State Court, whether "a final judgment" in the highest court of the State in which a decision in the suit could be had," or otherwise, or that in the suit in which any judg-

ment, final or otherwise, was had or given, there was drawn in question the validity of a statute, or an authority exercised under the United States; or that the decision was against their validity; or that in any such judgment or suit any title, right, privilege or immunity was claimed under any statute or authority exercised under the United States, and that the decision was or is against the title, right, privilege or immunity specially set up or claimed under such statute, commission or au-authority.

Nor do the 6th, 7th, 8th, 9th, 10th, 11th or 12th assignments of error allege any such decision against the validity of any statute of the United States or authority thereunder.

Neither the 1st or 12th assignments of error as to the amount of the judgment, concern any matter with which this Court can interfere. They allege no decision against a law or authority exercised under the United States, or a right claimed thereunder.

And in fact the validity of a statute, or of an authority exercised under the United States was not drawn in question; nor was any right, title, privilege or immunity claimed under any statute or authority exercised under the United States, decided *adversely* by the final judgment of the highest Court of the State in this case.

Second.

If, irrespective of the insufficiency of the assignment of errors filed upon the allowance of the writ of error, the determination of this Court as to the jurisdiction of the Supreme Court to review the final judgment of the State Court is dependent upon the issues and questions raised by the pleadings in the

action, then this Court clearly has no jurisdiction to re-examine such judgment.

There certainly was no right, title, privilege or immunity under a statute of, or under a commission held or an authority exercised under the United States specially or otherwise set up or claimed by the defendants Bartlett, Woodruff and Nitchie; and therefore there could not have been any decision *against* any such statute, title, right, privilege or immunity.

The answer of the defendants Bartlett & Co. is entirely devoid of any allusion to any such claim of right, title, privilege or immunity under any statute of the United States, or any authority exercised under the United States (fols. 568 and 9, pp. 397 and 8).

The action was one for damages for conspiracy between the defendants composing the firm of Bartlett & Co. and the Health Officer of the Port of New York (Dr. Smith), in causing plaintiffs' property to be seized and detained and put through a pretended process of disinfection, unnecessarily; when it was claimed the goods were not infected and did not need to be disinfected.

The Health Officer set up that all his actions in the premises were taken by him as such Health Officer and not otherwise, with due regard to the sanitary condition of the port and with due and proper judgment and discretion.

The defendants Bartlett & Co. merely denied generally the allegations of the complaint. They set up no affirmative defense; and neither set up or claimed any right, privilege or immunity in the matter under any statute or authority exercised under the United States (pp. 397 and 8).

It is hardly necessary to state that the subject of quarantine of the Port of New York is, or was at this time, exclusively under the control of the State

of New York, and of State officials, and subject to the legislation of the State.

Chap. 358 *Laws of N. Y.*, 1863.
N. Y. R. S., *Vol.* 2, *p.* 1168 (8th Edn.), *Secs.* 25 *et seq.*

The Health Officer of the Port of New York is not a Federal, but a State officer, appointed by the Governor of the State, and subject only to State laws in the discharge of his duties, and under control of the Commissioners of Quarantine, who are also State officers.

Laws 1863, *Chap.* 358, *Secs.* 25 *to* 45, &c.
Laws 1865, *Ch.* 592, *and N. Y. R. S.*, *Vol.* 2, *p.* 1172 (8th Edn.), Sec. 41.

As long ago as the case of *Twitchell* v. *Commonwealth*, 7 Wallace, 321 (1868), it was held by the Supreme Court that "writs of error to State Courts have never been allowed as of right, but the practice has always been to submit the record of the State Court to a Judge of this Court, whose duty has been to ascertain, upon examination, whether any question cognizable here upon appeal was made and decided in the proper court of the State, and whether the case, *upon the face of the record*, will justify the allowance of the writ."

The language of Sec. 709, U. S. R. S., is that the decision of the State Court, in order to be re-examined by the Supreme Court, must be against the title, right, &c., *specially set up and claimed* under a statute of, or a commission held or authority exercised under the United States.

This is the substantial equivalent of the provisions of the 25th section of the Judiciary Act of 1789, that no other error could be assigned or regarded as ground of reversal than such as appears on the face of the record.

It goes further than that, and says, in effect, that in order to a re-examination by the Supreme Court

of the judgment of a State Court, the title, right, immunity or privilege, under a Federal statute or authority, claimed to have been decided against, must have been *specially set up and claimed in the State Court.*

Murdock v. *Memphis*, 20 Wall. 590.

The questions therefore arise, what is *the record* of the case in the State Court?

How must it appear that the validity of, or a right, title, privilege or immunity claimed under, a statute of, or an authority exercised under the United States was specially set up and claimed in the State Court?

And how must it appear that the decision of the State Court was against such right, title, privilege or immunity?

The "*record*" in any action in the State Court in New York consists of what is called the "*Judgment Roll*;" and that is made up of the summons, the pleadings in the action, *i. e.*, the plaintiff's complaint, the defendant's answer, the verdict, or the Clerk's certificate of the trial, and verdict or decision, and the judgment entered thereon, and the orders, &c., on file.

Section 1237 of the N. Y. Code of Procedure directs that "The Clerk, upon entering final judgment, must immediately file the judgment roll which must consist * * * of the following papers: the summons, the pleadings or copies thereof, the final judgment and the interlocutory judgment, if any, or copies thereof, and each paper on file (*i. e.*, in the Clerk's office) or a copy thereof, and a copy of each order which in any way involves the merits or necessarily affects the judgment."

And Sections 1238 and 1239 directs how and by whom the judgment roll is to be made up; and Sections 1245 and 1246, &c., how the judgment is to be docketed and its effect and lien, and how it may be enforced (Secs. 1251 *et seq.*).

The judgment roll is the record of the judgment, and is the only thing on file and of record in the office of the Clerk of the Court showing what the judgment in the action is, what it awards and on what it is founded—whether in an action at law or in equity.

So, in the printed record in this case, at page 395 (fol. 564), we find: "*The following is a copy of the judgment roll.*"

And then follows the summons in the action; the complaint, setting forth the plaintiff's cause of action and demand of judgment (p. 395–6, fol. 565 to 567); the answer of the defendants Bartlett, Woodruff and Nitchie, setting up their defense (p. 397, fols. 569, &c.); the answer of the defendant Smith, setting up his defense (p. 399, fol. 571); the Clerk's certificate of the trial and verdict (p. 400, fol. 574); and the judgment entered thereon in favor of the plaintiffs and against the defendants Bartlett & Co. for the amount of the verdict and costs (p. 401, fol. 575).

This is the judgment roll proper, as filed in the Clerk's office.

It discloses nothing as to the grounds of the judgment or what was decided by the Court, except as indicated by the issues presented by the pleadings.

The N. Y. Code., Sec. 500, specifies what an answer in an action must contain, *i. e.*, "1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim, &c."

The answer of the defendants Bartlett & Co. came strictly within the first subdivision of this section. They set up no new matters constituting any defense.

If they wished to avail themselves of the benefit of any title, right, privilege or immunity claimed under a statute of, or authority exercised under the United States, it was their duty to state it as new matter constituting a defense as provided by Sec. 500, N. Y. Code, and so specially set it up and claim it as provided by Sec. 709 of U. S. R. S.

The papers printed in the transcript of record here following the judgment on the verdict are no part of the original judgment roll.

The notice of appeal to the General Term of the New York Supreme Court, with the copy of "bill of particulars of plaintiffs' claim," (which is erroneously and unnecessarily inserted,) and the order of the General Term affirming the judgment upon condition of its being reduced, with the plaintiffs' stipulation reducing it accordingly; and the judgment on the decision of the General Term, are no part of the original judgment roll, though they do form part of the record of the judgment entered at the General Term as certified by the Clerk on the appeal to the Court of Appeals (p. 403, fol. 581).

So with the record of the subsequent proceedings on the appeal to the Court of Appeals, with the decision of that Court, and the orders entered in the Supreme Court thereon (fols. 589 to 592, p. 408 and 9, and fols. 593 to 595, p. 410–11).

Even if all these are parts of the "record" in the State Court they do not show or disclose in any way that any title, right, privilege or immunity under any statute of, or commission held, or authority exercised under the United States, was set up or claimed; or that there was any decision in the highest Court of the State against any such title, right, privilege or immunity.

That record shows merely that upon the cause of action set up in the plaintiffs' complaint, damages for unlawful detention of plaintiffs' property, judgment was entered upon a trial by and the verdict of

a jury, against the defendants Bartlett, Woodruff and Nitchie, upon the denial stated in their answer, for $8,000 damages, with costs (pp. 400, 401, fols. 574–5); that that judgment was affirmed by the General Term except as to the sum of $1,676.56 (p. 402, fol. 578); and that the judgment was finally reduced by the Court of Appeals to $3,182.50 for damages, with interest, and some costs (pp. 408–411, fols. 589 to 595).

What were the elements that entered into or made up the judgment and its modification, does not appear in the record of the different judgments.

It was the rule in this Court previously to the Act of 1867, which is embodied in U. S. R. S., §709, that the Court would not look to the opinion of the Court below to determine the question of jurisdiction, except as to the State of Louisiana.

Williams v. *Norris*, 12 Wheat., 117.
Rector v. *Ashley*, 6 Wall., 142.
Gibson v. *Choutean*, 8 Wall., 314.
Dugger v. *Bocock*, 94 U. S., 603.
Murdock v. *Memphis*, 20 Wall., 590.

In *Murdock* v. *Memphis*, 20 Wall., 633, this Court held that under some circumstances the Court would examine the opinion of the Court below, to ascertain the fact as to whether any jurisdictional question was raised; but that "the pleadings, bill of exceptions, judgment, in short, the record, must be the chief foundation of the inquiry."

Third.

If, however, notwithstanding the omission to set up any right or claim under any Federal statute or authority by the defendants' answer, the tes-

timony and proceedings in the trial court, and appellate courts, below, as contained in the printed "Case" on appeal at the General Term of the New York Supreme Court, and the Court of Appeals, are examined in connection with the rulings and decisions of the trial and appellate Courts, as contained in the "transcript of record" here, it will be found that the decision of the highest Court of the State (*i. e.*, the New York Court of Appeals) was *not against* any title, right, privilege or immunity set up or claimed, or against any authority, or the validity of any authority, exercised under the United States.

On the contrary, so far as any question of that character was raised, or was involved, the decision was *in support of* such alleged right, title or authority.

A somewhat detailed examination of the testimony and proceedings on the trial of the action, and the subsequent decisions on two appeals in the State Courts, may be necessary to show how far any such questions were raised, and how they were finally decided in the highest Court of the State.

In examining this record we find that the facts developed by the evidence and the questions which arose at the trial of the action, so far as necessary to be considered here, were substantially the following:

The plaintiffs below were the undisputed owners of the rags imported by the two ships, the *Vigilant*, which arrived at the New York Quarantine about May 30, 1885 (pp. 13, 14, fols. 11, 12), and the *Battaglia*, which arrived about June 5th.

There were 2,920 bales on the *Vigilant* (p. 14, fol. 12), which came from Hiogo, Japan; and 150 bales on the *Battaglia*, from Leghorn (fol. 543, p. 381, p. 350, fol. 491).

The Health Officer passed the Vigilant at Quarantine on May 30th, and gave her permission to proceed (Plaintiffs' Exhibit "A," p. 345, fol. 483).

Some question was raised on the trial, and later, as to whether the rags on the vessel were not excepted from this pass or permission to proceed, inasmuch as the words ("rags excepted") are inserted in the pass or permit after the words "Cargo general," and over the words "The vessel has permission to proceed"—whether the words ("rags excepted"), qualified the description of the cargo, "Cargo general (rags excepted)," or "The vessel has permission to proceed (rags excepted)."

That question is quite immaterial here, as it raises no point now involved in the case. Different views were taken of it in the courts below. The General Term held that it applied to the description of the cargo (p. 404, fol. 582); the Court of Appeals thought otherwise (fol. 602, p. 415).

At all events the Sanitary Superintendent of the Health Department of the City of New York, to which the Health Officers' quarantine permit was required to be exhibited, if the vessel was docked in New York (fol. 483, p. 345) on June 1, 1885 (the next day after arrival and passing quarantine), gave a permit to the plaintiffs to land and store the rags, if not broken from bulk in the bales they were then in until removed from the city.

(*Plffs.' Ex. G, fol.* 490, *p.* 349, *and fol.* 14, *p.* 15.)

One other thing was necessary to be done before the rags could be unloaded. That was, that they should be entered at the Custom House, and the Collector's permit obtained to land them (p. 37, fol. 45), and this the plaintiffs tried to do; but the Collector refused to receive the entry of the goods (p. 15, fol. 14); (*U. S. R. S., Sec.* 2785).

The rags were not subject to the payment of any duty (U. S. R. S., Sec. 2505 (Rags), fol. 44, p. 36).

It was therefore the duty of the Collector to accept the entry and grant a permit for the landing of them. (U. S. R. S., Sec. 2826): "The Collector shall grant

a permit for the landing thereof;" *i. e.*, of goods which have been entered.

This action of the Collector, or refusal to act as required by law, it was claimed was justified by certain orders or circulars which had before then been issued by the Treasury Department. One was dated November 15, 1884, issued by Secretary McCulloch (*Defendants' Exhibit* 51, *p.* 386, *fol.* 550). It prohibited the unloading in the United States of old rags shipped from foreign ports or countries *known to be infected with contagious or epidemic diseases.* It further directed that "no old rags shall be landed at any port of the United States except on a certificate of the United States consular office at the port of departure that such rags were not gathered or baled at, or shipped from, any infected place or any region contiguous thereto."

Another circular was issued by the Treasury Department on December 22, 1884, *which modified all previous circulars* of the Department concerning the importation of old rags, by providing that "no old rags, except those afloat on or before January 1, 1885, on vessels bound directly to the United States, shall be landed in the United States from any vessel from any foreign country, except upon disinfection, at the expense of the importers, as provided in this circular, or as may be hereafter provided" (Exhibit Fairchild 18, p. 391, fol. 558).

Certain processes for disinfection were specified, and other directions given for landing and storing rags for the purposes of disinfection (fol. 558). This circular was also issued by Secretary McCulloch.

It was claimed that these circulars were in force at the time of the arrival of the ships *Vigilant* and *Battaglia.*

There was also a letter from the Secretary of the Treasury to the Collector at New York, dated January 12, 1885, in reference to the landing and storage of rags to be disinfected, in which the Secretary

approved of the selection of the Baltic Stores, in Brooklyn (which belonged to the defendants in error, E. B. Bartlett & Co.), as a proper place for that purpose, and directed that "where rags requiring disinfection form part of a cargo they will be placed on lighters as fast as discharged, and the lighter loads be taken to the place above designated" (*Ex. Fairchild*, 19 *B*, *p.* 392, *fol.* 560).

When the plaintiffs below, Lockwood and McClintock, were unable to procure from the Collector of the Port a permit for the landing of the rags, they went to the Secretary of the Treasury at Washington (p. 15, fol. 14, and p. 16, fol. 15; fol. 21, p. 20).

The Health Officer of the port (Dr. Smith), one of the defendants below, had stated that there was no objection to the landing of the rags; that the Collector should not make any trouble about them; that they had passed Quarantine; that Lockwood and McClintock had a permit from the City Board of Health, and they were entirely out of his jurisdiction (fol. 20, p. 19). He also said that there was no suspicion of any infection; that he had passed them through Quarantine and that he had no further authority over them (*Id.*).

The plaintiffs below had produced certificates of the exporters of the rags which come by the *Vigilant*, certified before the United States Consuls at Hiogo and Kanawaga, Japan, that the rags in question had not been collected, packed or otherwise placed or passed through any district infected with cholera or other infectious disease (*Exhibits C and D*, *pp.* 345, 346 *and* 347). The United States Consuls also certified that they had no knowledge (official or personal) "of any case of cholera existing in Japan" at the time (*pp.* 346 *and* 347, *fols.* 485 *and* 6).

The Secretary of the Treasury, or Acting Secretary, Mr. Fairchild, who was examined as a witness in the case, by commission, testified that: "*When*

(he) came to examine the laws of the subject (he) was satisfied that there was no statute which gave the Secretary of the Treasury any authority except in aid of the health officers of the ports" (p. 339, fol. 473).

In accordance with this conclusion of the Secretary of the Treasury, he, on June 5, 1885, telegraphed to the Collector of Customs at New York: "As to rags per *Vigilant*, from Japan, which importers claim were mostly on board prior to January 1st, you are directed to submit all to Health Officer Smith, and to be governed by him in the matter" (Plffs.' Ex. S, p. 357, fol. 502).

On June 6th the Collector wrote to the Health Officer advising him of the receipt of this telegram, and asked to be advised "whether, in his judgment as the Health Officer of the port, the rags might, with safety to the public health, be allowed to be landed, and, without disinfection, to go into consumption" (Plffs.' Ex. M, fol. 499, p. 355).

The Health Officer wrote a long reply to this letter, dated the same day, June 6, 1885 (Plffs.' Ex. L, pp. 351–2, 3 and 4), detailing the result of many medical conferences and sanitary investigations, and stating that he did "not claim that it is necessary for the protection of public health that all rags should be disinfected," although it was "impossible to determine what may or may not be admitted with absolute assurance of safety;" and concluding that it seemed "advisable that for the present the rule of disinfection of rags should be general," and that the rags on the *Vigilant* should not be an exception to the rule (fol. 497, p. 354).

But he was very careful not to give any positive direction that they be disinfected; and he most distinctly and positively testified that he never gave any order that these rags should be disinfected, either at Bartlett's stores, or elsewhere (p. 174, fol. 245).

Dr. Smith, the Health Officer, when examined as a witness, gave this testimony (p. 174, fol. 245):

"Q. Did you ever give any orders for the disinfection of rags of the *Vigilant* or *Battaglia*, and if so, when and where? A. I don't remember to have given any."

"Q. *I ask you if you ever gave an order for the disinfection of the rags on the "Battaglia" or the "Vigilant?"* A. No, sir; I NEVER DID" (fol. 245).

Before the acting or Assistant Secretary of the Treasury had acted in the matter, and before his telegram to the Collector of June 5, 1885, had been sent, and before the Collector had had the correspondence of June 6 with the Health Officer, and on June 3d a "general order," as it is called, "to send merchandise to public store" (Defs'. Exhibit 8, p. 366, fol. 577a), was issued by the Collector's office (pursuant to Secs. 2880 and 2966 of the U. S. Revised Statutes, it is claimed, as noted in the order) by which it was provided that "the inspector on board the ship *Vigilant*, Gould, master, from Hioga, will allow to be landed, and will send to the public store, E. B. Bartlett's, south, all merchandise for which no permit or order shall have been received by him to the contrary to this direction," with certain exceptions, which did not include rags, in the body of the paper, although the word "rags, A. W. H.," was written across the face of it (see bottom of page 366). Whether that indicated that the "rags" were within the exception, or were designated to be sent to the storehouse, does not appear.

There is nothing in this order about disinfection of rags, or directing any disinfection. Whether it was proper for the Collector to issue such an order is not now the question; although it is to be noted that the reason why no "*permit*" (that is, a permit to land or unload) had been obtained for the rags, was that the Collector had refused to allow the goods to be entered, or to accept an entry of them.

Section 2880 of the U. S. R. S., under which, at least in part, it is claimed this "general order" was issued, provides only for taking possession of merchandise remaining on any vessels after eight days from the reported arrival of the vessel, if the vessel is of less than 300 tons; twelve days if of less than 800 and more than 300 tons, and fifteen days if over 800 tons. Neither of these periods had elapsed. There was no evidence that such taking possession of this merchandise by the Collector was with the consent of the owner or consignee of the merchandise; but quite the contrary, the owner was claiming it and trying to get possession of it. Nor was it shown to have been with the consent of the owner or master of the vessel.

Nor did it appear that the provisions of Section 2966 were applicable to the merchandise. The *Vigilant* was not a vessel propelled in whole or in part by steam.

The provisions of Section 2965 were not applicable to the case, because the merchandise, *i. e.*, the rags in question, were not "*unclaimed;*" but, as the Court said, they were "*very much claimed*" (fol. 585, p. 406).

Nor is there anything to show that the provisions of Section 2774 were not complied with.

On *June* 10, 1885, the Secretary of the Treasury pursuant to his conclusion that there was no statute which gave him any authority in respect to the landing and disinfection of imported rags, except in aid of the Health Officer (fol. 473, p. 339), issued a circular or order to all collectors of customs and others (Plffs.' Ex. *La*, fol. 498, p. 354), as follows: "Whereas it has been conclusively shown to the department that, under existing laws, no general regulation can be legally framed, whereby the disinfection of old rags can be accomplished in foreign ports to the satisfaction of the several health authorities. Therefore it is ordered: 1. *That all circulars of this de-*

partment concerning the disinfection of imported old rags are hereby revoked; and that all old rags hereafter imported from foreign countries shall only be admitted to entry at the Custom House upon the production of permits from the health officers at the ports of importation, duly authorizing the landing of the same. II. Vessels carrying old rags, arriving at any United States quarantine, will be detained by the quaratine officers and held subject to the orders of the proper health authorities at the port of destination" (p. 354–5, fol. 498, and Ex. No. 6, fol. 552, p. 387).

(The italics are, of course, not so in the original, but like the rest of the circular.)

It will thus be seen that the Treasury Department disclaimed any control over the subject of the disinfection of imported rags, and remitted the whole matter to the direction of the Health Officer; and the Health Officer says that he gave no direction for the disinfection of the rags in question (fol. 245, p. 174).

This conclusion of the Secretary of the Treasury was strictly in accordance with the provisions of Sec. 4792 of the United States Revised Statutes, which merely required the officers of the customs revenue of the United States, and other Government officials, to observe the quarantine and other restraints established by the health laws of any State respecting any vessels arriving in any port; and requiring them to aid in the execution of such quarantine and health laws within their respective precincts, as they should be directed by the Secretary of the Treasury.

The provisions of Sec. 4793 had no application because, as the Court below said: "The goods in question were discharged at the port of entry, and no power under this section is pretended to have been exercised" (p. 405, fol. 585).

As the Court below said: "In these sections no power is found to do anything except in aid of the

health authorities in the performance of their duties" (p. 406, *Id.*).

The testimony of Secretary Fairchild was in accordance with this conclusion. Being asked on cross-examination by defendant's Bartlett & Co.'s counsel (p. 343, 12th Cross-interrogatory): "Was it your intention in the instructions from the Treasury Department to the Collector of the Port of New York about June 10, 1885, or in the circular of the same date, to provide for the free discharge of rags from Eastern countries without disinfection?" he replied: "*My intention was to put the whole responsibility of it on the health officers of the ports.*"

And in answer to the 17th cross-interrogatory as to whether the cargoes of the *Vigilant* and *Battaglia* were ordered to be disinfected by the Collector of the Port of New York, and if so, whether it was under the authority of the Treasury Department; and whether there was any report of such disinfection by an agent or inspector of the Custom House in New York, he answered: "So far as I know of, and have been able to ascertain, the files of the department fail to show any such order to report" (p. 344, fol. 481). (This evidently should read "order *or* report.")

The day before the circular order of June 10, 1885, was issued, the Collector or Deputy Collector at New York made an order directing the inspector in charge of the ship *Vigilant*, under general order of June 3d, to allow to be landed and to send as bonded lighters to Baltic stores (E. B. Bartlett & Co.'s south) for disinfection all rags for which no permit had been received (Deft.'s Ex. 2, fol. 570, p. 362).

On June 10th, the same date as the Treasury circular, the Health Officer, Dr. Smith, gave a certificate that the bales of rags per ship *Vigilant*, from Hiogo (Japan), *were not from a cholera infected*

port, though there was written in the certificate "to be disinfected" (Plffs'. Ex. B, p. 345).

The bark *Battaglia* arrived and was entered at the Custom House on June 6, 1885 (p. 381, fol. 543). She had but 150 bales of plaintiffs' rags on board. On the 9th of June a general order was made omitting rags.

On June 11th Secretary Fairchild wrote to the Collector at New York that the consignees of the rags on the *Battaglia* desired that they should be governed by the circular of June 10, which placed the control of the matter of disinfection with the Health Officer, and the Secretary added: "The department has no objection to this, with the understanding, however, that you first submit all the facts to the Health Officer of the port, and receive assurance him from that the permit, if any, issued in the case is the "permit duly authorizing the landing" of the rags, which is required by the circular (*Defts.' Ex.* 22, *p.* 374, *fol.* 531, *and Deft.'s Ex.* 40, *p.* 383). This letter was sent to the Health Officer (*Defts.' Ex.* 36, *p.* 381, *fol.* 543 *and fol.* 382).

In further pursuance of the policy determined upon by the Treasury Department, the Secretary wrote to the Collector at New York, *on June* 12th: "Referring to the circular of the 10th inst., *by virtue of which the matter of the disinfection of old rags is placed under the exclusive jurisdiction and control of the Health Officer of the port*, you are requested to notify such officer that the disinfection of rags, when required at your port, must hereafter be done at such places as he may designate. You will also notify the proprietors of the warehouses where such disinfection has been heretofore effected under your supervision, of such change, *and inform them that the designation of their warehouse for such purpose is revoked.*"

(Defts.' Ex. 23, p. 374, fol. 531.)

Thus the circulars and orders designating, or approving of the designation of Bartlett's Baltic Stores as a place for the disinfection of rags, so far as the Treasury Department was concerned, was revoked.

The rags per *Vigilant* were apparently not landed at the Baltic Stores until June 13th (Defts.' Exs. 41 and 42 to 47, p. 384).

The receipts for the same are dated that day, and though signed by the Paper Stock Disinfecting Company, it was shown on the trial that that company was a creature, though nominally the lessee of the defendants Bartlett & Co., of these stores, with which Bartlett & Co. made a contract to furnish all the labor and apparatus for the alleged disinfection, and they rendered and collected all the bills. It was a scheme designed to avoid liability on the part of Bartlett & Co. for doing this pretended "disinfecting."

(Plffs.' Ex. V., pp. 357-8-9; Defts.' Ex. 30, p. 378, fol. 538, and Plffs.' Ex. K, fol. 501, p. 356, and Ex. R, p. 357).

E. B. Bartlett was a stockholder in the company to the extent of $40,000, which was issued to him for nothing (fol. 173, p. 121 and p. 125, fol. 179 *et seq.*). He was a director in the company, and used his influence with the Secretary of the Treasury and the Health Officer to have these and other rags sent to his warehouses to be disinfected.

(See letter of Secy. of Treasury of Jan. 12, '85, Ex. Fairchild, 19 B, p. 592, fol. 560 and p. 123, fol. 176, and Defts.' Ex. 7 (Ex. Fairchild No. 20), p. 365, fol. 516, and p. 366 and pp. 132 and 133, &c.).

This is perhaps immaterial here, but it shows the matters which were principally litigated on the trial; the action of Bartlett and his firm, and their relations to the business of disinfecting rags, and the disinfecting company, and the influences which were

brought to bear upon the Health Officer and the Treasury Department.

It is to be remembered that the main issues tried in the Court below were whether there was or had been a conspiracy between Bartlett or his firm and the Health Officer, Dr. Smith, who were the only parties to the action, to cause or procure the plaintiffs Lockwood & McClintock's rags to be taken possession of and put through this pretended process of disinfection, without right or necessity, under a pretence of authority from the Treasury Department or Collector. The Collector was not a party to the suit.

There never was any pretence even that the rags in question were infected.

The Health Officer himself certified that they were not from a cholera infected port (Plffs' Ex. B, p. 345). They were certified by the exporters not to have been collected or packed or passed through a district infected with cholera or other infectious disease (Plffs' Exts. C and D, pp. 345, 6 and 7, and certificates of U. S. Consuls attatched). Dr. Raymond, Health Officer of Brooklyn, testified that he was thoroughly satisfied that the rags were not infected and not dangerous, from evidence which came from the Health Officer of the Port, Dr. Smith, and he considered it safe and prudent to have them landed without disinfection.

(P. 40, fols. 50, 51, and p. 41 *et seq.*).

It was an afterthought and pretence in order to avoid liability on the part of Bartlett & Co., to claim that what they did in the matter they did under the order of the Collector of the Port and the Health Officer; whereas, whatever the Collector did in the matter he did, as he claimed, only as directed or requested by the Health Officer; while the Health Officer, in order to avoid liability on his part, distinctly disclaimed that he gave any orders or direction in the premises.

Each were part of a ring, and each pointed to the

other as the one who did it. Each sought to put the blame of what was done upon the others.

On June 13th, the Collector advised Dr. Smith, the Health Officer, of the letter of the Treasury Department of the 12th inst. above referred to, revoking the designation of Bartlett's stores as a place for disinfection of rags, sending him a copy of the letter, and referring him to the circular of June 10th, which had also been sent to him.

Defts.' Ex. 37, fol. 544, p. 382, and Defts.' 37, fol. 544, p. 381.

The rags from the *Vigilant* were disinfected or put through the pretended process of disinfection between the 13th and 23d of June.

See Certificate of Inspector, Defts.' Exhibits 48 and 49 to 56, fol. 547, p. 384.

The Health Commissioner of Brooklyn apparently refused to allow the rags on the *Battaglia* to be landed in Brooklyn (*Plaintiffs' Exhibit* 1, fol. 492, p. 351; *Defendants' Exhibits* 15 and 16, fol. 518, p. 367), and thereupon the Collector ordered the transfer of the rags by bonded lighter to Robbins Reef for disinfection (*Defendants' Exhibit* 26, p. 376); although it nowhere appears that the Health Officer of the Port had given any orders for such disinfection.

The Collector states that his action in so doing was under Section 2880 of Rev. Stat., U. S.; but that does not seem to give any authority for such action.

The Collector appears to have written to the Secretary of the Treasury on the 16th of June in reference to an action which had been brought against him, as well as the Paper Stock Disinfecting Company, by Lockwood and McClintock in the New York Supreme Court, Kings County, for an injunction to restrain the disinfection of the rags from the *Vigilant*, in

which he states that the rags were ordered to be disinfected pursuant, as he says, "to your instructions of 5th instant and the advice of the Health Officer" (*Defendants' Exhibit* 24, fol. 532, p. 375).

But there were no such instructions of the Secretary of the Treasury. The "*instructions*" of the 5th inst. referred to was the telegram of that date from the Secretary to the Collector, in which the Collector was directed to submit all facts to the Health Officer *and to be governed by him in the matter* (*Plaintiffs' Exhibit S*, fol. 502, p. 357, *and Plaintiffs' Exhibit M*, fol. 499, p. 355).

The *advice* of the Health Officer referred to was probably that contained in his letter of June 6 to the Collector (*Plffs.' Ext. L, p. 357 and fol. 497, p. 354*). But that contained no order for the disinfection of the rags, only an expression of opinion that it seemed advisable that rags generally should be disinfected; and the Health Officer so regarded it (see his testimony, fol. 242, p. 172). He was asked: "Did you understand on the receipt of that letter that your action controlled the place of disinfection and the disinfection of old rags in the port of New York? A. *I did not.*" "Q. Did you when you read that statement read the inquiry of the letter in the last paragraph? A. *I did, and I believed it was asking me for advice*" (fol. 242).

It is true that the Collector had written to the Secretary of the Treasury on the 8th of June, transmitting a copy of the Health Officer's letter of June 6th, in which he says that "governed by his conclusions I shall, as directed by you, order the rags when landed to be disinfected" (Ex. Fairchild, 5, p. 387). But, as before said, the Health officer gave no directions or order for disinfection of these rags. He merely *advised* that disinfection should be the general rule (fol. 497, p. 354).

The proceedings in the suit of Lockwood & McClintock against the Collector are set out at pages 369 to 373. The injunction was dissolved, because,

as the Court held, the plaintiffs had an adequate remedy at law for damages (p. 373, fol. 529); and the action was afterwards discontinued, and this action commenced to recover the damages suffered, as indicated in the opinion of the Court.

This being the state of the proofs, with much oral testimony in regard to the operation and performance of this process of disinfection by Bartlett & Co., and the Disinfecting Company, and the relations of the parties to it, and proof that the rags were not infected, &c. (p. 13 to p. 317), the defendants below moved at the close of the testimony, after a trial occupying seven days (p. 318), for a dismissal of the complaint, on ground claimed by the counsel for Dr. Smith being "that the delivery and disinfection of the *Vigilant's* rags at the Baltic Stores was not by the Health Officer or his orders" (fol. 438, p. 318 (6)).

The Court ruled: "That the acts of the Govern-"ment officials in ordering these goods to the ware-"house to be disinfected were entirely outside of "any authority conferred upon either the Collector "of the Port or the Health Officer, or any one else; "that the taking of those goods against the protest "of the plaintiffs to those stores, and subsequently "holding them and refusing to deliver them with-"out the payment of their charges, was an act not "authorized by law, and was entirely unjustified "by any power conferred on either of those officers, "and was a direct injury to the plaintiffs' property" (p. 319).

And the Court held that for that an action would lie, and that "on the evidence in the case, the firm of Bartlett & Co., owning these stores and having possession of the property and refusing to deliver it to the owners without payment of the sums demanded, became thereby liable for the damage sustained in consequence of their refusal." "Whether or not Dr. Smith was also liable depended upon whether he conspired with the Bartletts to get the goods into

their possession for this purpose," and as to that the Court submitted it to the jury (p. 319, fol. 440).

The Court thereupon charged the jury at considerable length (pp. 319-324).

Among other things the Court, after stating that the rags belonged to the plaintiffs, who were entitled to the possession of them, and that they were taken possession of by Bartlett & Co. under the circumstances and in the manner stated, charged as a matter of law that Bartlett & Co. had no lien upon the goods; they had no right to retain possession of them, and keep them away from the plaintiffs, who were the real owners; that while the powers vested in the Health Officer of the port were very large to provide that merchandise should be submitted to such measures of purification as he should judge necessary (fol. 443, p. 321), he was not, on that account, authorized to take goods from the possession of the owner and deliver them over to any third person for that purpose, who could then retain them and charge what he pleased for that purification, and deliver them to the owner only when such charges were paid; but that that duty was thrown upon the Health Officer as a public officer to perform; and while the statute provided that the expenses he was put to should be a lien upon the goods, his action should be performed under the sanction of his official duty as a public officer; that in this case nothing of that kind was attempted; that it did not appear that the Health Officer did himself directly order that these goods should be delivered to Bartlett & Co., or that the disinfecting company should be employed to disinfect the goods. Bartlett & Co. were therefore liable for the wrong, and that the plaintiffs were entitled, as a matter of law, to the judgment against them for the amount of the damage sustained by the plaintiffs in consequence of that unjust and improper detention; and the Court directed them to find a verdict for the plaintiffs against Bartlett & Co. for such damages (p. 522, fol.

444), which was the amount of the payments they were obliged to make to Bartlett & Co. with interest, and such other damages as the jury should find they had sustained (*fols.* 443, 444, *pp.* 321, 322; *fols.* 447, 448, *pp.* 323, 324).

The Court submitted the question to the jury, whether or not Dr. Smith, the Health Officer, had conspired with Bartlett & Company to procure the possession of the merchandise to be delivered to them for this process of disinfection (fols. 445, 446, pp. 322, 323).

As before stated, the jury found a verdict in favor of the plaintiffs Lockwood and McClintock against Bartlett & Company for $8,000; and no verdict, or failed to agree as to Dr. Smith (fol. 467, p. 335). And after some discussion as to the form and sufficiency of the verdict, it was accepted in that form (fols. 468, 469, p. 336; fol. 574, p. 400).

As is evident from the proofs submitted, this verdict was made up of the amounts paid Bartlett & Company for storage, lighterage and other charges, as well as for disinfection. The charge for disinfection for the rags on the *Vigilant* was $2,920 for 2,920 bales at $5 per ton (*Defendants' Exhibits* 32 and 33, fol. 540, p. 380), and $262.50 for disinfecting the rags from the *Battaglia*,—those two sums amounting to $3,182.50; with a charge of $1,168 for storage for four months to October 23, 1885, on the 2,920 bales of rags per *Vigilant* weighing 1,168,000 pounds, and labor, $350.40; trucking, $486.50; lighterage paid, $730; making with the $2,920 for disinfection charged, $5,654.90, on account of which they made a deduction or allowance of $750 from the charges on account of the *Vigilant's* rags; (*Plaintiffs' Exhibit K*, fol. 501, p. 356), and for storage, labor, cartage lighterage and disinfection of the rags from the *Battaglia* the charge was $454.25, of which $262.50 was for disinfection as before stated, and $191.75 for

the other items on account of which an allowance of $45 was made (Exhibit R. p. 357); so that $2,677.75 was allowed by the jury to the plaintiffs for damages, including interest.

Upon the appeal, as before stated, the judgment was reduced by the General Term of the Supreme Court to the extent of $1,675.16 (fol. 578, p. 402), which the Court said was the amount of the verdict allowed for damages for detention of the merchandise above the amount paid by plaintiffs to Bartlett & Company for the different items and charges, and interest thereon, and interest on the value of the merchandise during the time of its detention by the defendants Bartlett & Company (fol. 588, p. 408).

The opinion of the Court at the General Term appears on pages 404 to 408. At folio 585, page 406, the Court says: "It is sought to justify the action of the Collector because of the provisions of the Revised Statutes of the United States, which authorize the Collector to take possession of unclaimed merchandise and store the same in any private bonded warehouse, such as the Baltic Stores. But the difficulty with this claim of the defendants is that this merchandise was not only not unclaimed but very much claimed. The plaintiffs demanded its entry. It was not liable to the payment of any duties, and it was the duty of the Collector, under Section 2826 (U. S. R. S.), to grant a permit for the landing thereof. Where the owner was claiming possession of his property, demanding a permit for the landing, it being confessedly free and not liable to duty, it seems to have been the duty of the Collector to have granted the necessary permits, and his seizure of the goods and the causing them to be lightered to the Baltic Stores was an unauthorized act, and for the expenses incurred in the performance of that act

certainly no person could be allowed to hold the goods from their owner."

"Neither can the acts of the Collector be justified by Sections 4792 and 4793 of the statutes," which are recited.

"In these sections no power is found to do anything except *in aid of the health authorities* in the performance of their duties, and to authorize unloading at some other place in the collection district other than the regular port of entry. The goods in question were discharged at the port of entry and no power under this last section is pretended to have been exercised."

The Court stated that the question involved in the case was: "*Did the Health Officer direct* the seizure of these goods and their conveyance to the Baltic Stores in one case, and to Robbins Reef in the other, and their disinfection by the Disinfecting Company; and if so, had he the power so to do, and to make the goods liable for the expenses so incurred;" and they decided that "in view of the evidence in the case it was not at all necessary to discuss the power of the Health Officer or as to whether he had or had not the power to do these various things, *because it did not appear that the Health Officer directly ordered any one of these things to be done;* and it was for the want of this direct evidence, probably, that the jury under the instructions of the Court did not find a verdict against Dr. Smith, the Health Officer" (fol. 586, pp. 406 and 407).

The Court further stated that the trial Court had directly charged this propositon, and that no exception was taken to it; and that the only reason that the case was allowed to go to the jury against the Health Officer was that there was some evidence from which the jury might have found collusion between Bartlett & Co. and the Health Officer. This evidence was not deemed sufficient by the jury, and so no verdict was rendered against the defendant Smith. That fact, however, in no way relieved Bartlett &

Co. from the position in which they found themselves. "*The Health Officer not having directed this procedure*, no shelter could be obtained from any supposed power which the Health Officer might possess" (p. 407).

And the Court further said, that "the Collector having no power to send any but unclaimed goods to the public stores, could not refuse a permit for the goods to be landed and cause them to be sent to the public stores to be disinfected at the expense of the owner; and that the act of the Collector being without authority, such act could confer no authority upon Bartlett & Co. to hold the goods until the charges incurred were paid. That the goods were not held as bonded goods and no duties were to be collected upon them, and even after permits had been issued for a delivery, Bartlett & Co. held the goods (fol. 587, p. 407). It was then Bartlett & Co. who were detaining the goods, and not the Collector."

Had the matter rested with this decision or opinion, it might, perhaps, have been claimed that a decision had been rendered in the case against a right, or the validity of an authority exercised under a law of the United States, as one of the incidental questions involved; although the main question depended upon the right, power or authority of the Health Officer of the port to order the goods in question to be disinfected; or whether he did in fact so order them to be disinfected.

But, as before stated, the defendants Bartlett & Company took an appeal from the decision and judgment of the General Term of the New York Supreme Court to the Court of Appeals, the plaintiffs having stipulated to reduce the judgment originally recovered in the action, as conditioned by the decision of the General Term, and the judgment as so reduced, having thereupon been affirmed.

The opinion of the Court of Appeals appears at folios 596 to 608, pages 412 to 419 of the Record.

The Court, after a statement of the case, decided or gave an opinion, per Bradley, *J.* (fol. 599), to the effect that "The question of the liability of the de- "fendants, other than Smith, as presented at the "trial, was by the parties treated as one of law "only, so far as related to the claim for the money "paid by the plaintiffs to obtain the possession of the "goods, and to which amount the modification of the "judgment by the General Term reduced the recov- "ery. And if there was any evidence to support it to "that extent, the direction of a verdict for that "sum was without error, unless the exceptions hav- "ing relation to the nature of the action, or the "efficiency of the verdict, were well taken (*Winchell* "vs. *Hicks*, 18 *N. Y.*, 558; *Dillon* vs. *Cockcroft*, 90 "*Id.*, 649)."

With these exceptions having relation to the nature of the action or the efficiency of the verdict, this Court has, of course, no concern.

The Court further said: "The plaintiffs were the "owners of the rags, and they were unconditionally "entitled to possession to them, and without pay- "ment of the charges asserted against them, unless "by force of some rule of law, regulation or author- "ity, the goods were lawfully taken and detained "for the alleged purposes and subjected to the lien "of charges for carriage, disinfection and storage, "or for some portion of them."

The Court thereupon, after reviewing the powers of the Health Officer of the Port of New York (*L. N. Y.* 1863, *Ch.* 358; *L.* 1865, *Ch.* 592), and the statutes of the United States before referred to (*R. S., Sec.* 4792, 4793), said: "The rags were free from duty, "and the only ground upon which the detention "of them from the plaintiffs could lawfully be justi- "fied is that it was with a view to the protection "of the public health."

The Court then refers to the various provi-

sions of the quarantine regulations and the circulars and orders of the Treasury Department of November and December, 1884, and January, 1885, which have been hereinbefore referred to, and then states the facts in regard to the arrival of the *Vigilant*, and the different orders of the Collector, together with his correspondence with the Health Officer of June 6, 1885, and the certificate of the Health Officer of June 10, to the effect that the rags by the *Vigilant* were not from a cholera infected port (fols. 601, 602, 603, pp. 414, 415, 416), and the Court went on to say:

"*The Secretary of the Treasury relieved his* "*department from further responsibility on the* "*subject of disinfection of rags by his circular of* "*June 10th, by which it was ordered that all circu-* "*lars of the department concerning the disinfection* "*of imported old rags were revoked;* and that all of "them thereafter imported from foreign countries "should be admitted to entry at the custom house "upon the production of permits from the health "officers at the port of importation, duly authoriz-"ing the landing of them; and that vessels carrying "old rags should be detained by the quarantine "officers, and held *subject to the order of the* "*proper health authorities* at the port of destina-"tion. And two days later, by another circular of "the Secretary of the Treasury, the Collector was "directed to notify the proprietors of warehouses "where disinfection had theretofore been effected "under his supervision, *that the disinfection of old* "*rags was under the exclusive jurisdiction of the* "*Health Officer*, and must be done at such places "as he might designate; and that the designation "of their warehouse for such purpose was re-"voked" (fol. 603, p. 416).

The Court further said that "whatever the Secretary of the Treasury, and through him the Collector, was lawfully permitted to do in respect to taking possession of the rags for the purpose of disinfec-

tion was in aid of the Health Officer and in observance of the health laws of the State. The direction of the Collector that the rags be sent to the places where they were taken from the vessels, was pursuant to the regulation or requirement that they should be disinfected, and it may be said to have been given pursuant to direction from the Secretary of the Treasury, and in aid of the Health Officer in the execution of his official power, by the observance of the regulations made by him in that behalf."

But the Court went on to say that "although these rags came within the rule or regulation adopted by him for disinfection, and by his approval and advice were sent to the place where they were taken for that purpose, *he testified that he never gave any order for the disinfection of the rags on either of the two vessels*" (fol. 605, p. 417).

"While his regulations provided that it be done, "and for that purpose the transfer of the rags from "the vessels to the warehouses was necessary, *it "does not appear that he employed anybody to "do it.* And, so far as appears, the work "of disinfection was not conducted under "the supervision or control of the Health Officer, nor "pursuant to his employment of the disinfecting "company, which owned the machine by which it "was done, or of E. B. Bartlett & Co., who, under "an arrangement with the company, operated the "machine in performance of the work. The goods "were sent to the warehouse apparently for the "purpose of disinfection, *and they assumed to do it "without any employment or direction of the Health "Officer, and did it without any approval by him of "the efficiency of the work or of the charges result-"ing from it.*" The Court therefore held that this method of creating charges against imported goods was not fairly within the purpose and meaning of the statute of the State, which was quoted (*Laws* 1865, *Ch.* 592, *Secs.* 6 *and* 7).

The Court further said:

"The difficulty with the claim for disinfection is "that the company or persons doing it *had no di* "*rection of the Health Officer for that purpose, nor* "*was it done by his employees.* The statute con- "templates that charges of this character shall "be incurred only by means of the official action, or "in executing the orders of the Health Officer, and be "subject to his control through those whom he "may employ to perform the service. His official "sanction and responsibility were essential to the "creation *in invitum* of charges upon the property "of the plaintiffs. *Those for the alleged service of* "*disinfection seem not to have had such support,* "*and therefore were not a lien upon the rags*" (p. 417, fol. 606).

"But this difficulty," the Court went on to say, "is not necessarily applicable to the charges for "lighterage and storage. The Baltic Stores had, "under the advice and approval of the Health Offi- "cer of the Port of New York, and the Health Com- "missioner of Brooklyn, been selected and desig- "nated by the Secretary of the Treasury as a ware- "house for the storage and disinfection of imported "rags, and Robbins Reef had also been duly des- "ignated as another place for disinfection of like "goods. *The Collector*, under his authority, in "view of the regulation for disinfection of the rags "on the two vessels adopted by the Health Officer, "*was justified in directing as he did the sending of* "*the rags to those places*, and the expenses of such "transfer were presumptively a lien upon the prop- "erty to which they related. No specific order or "direction of the Health Officer is essential for that "purpose. It is sufficient that it was done pursu- "ant to regulations, within his power, made by "him" (fol. 606, p. 417).

After some allusion to the liability of the Health Officer in case there was a collusion or conspiracy

between him and Bartlett & Company, the Court further said:

"In view of what has already been observed, that "which was done by way of transfer of the rags "from the vessel to the selected and designated ware-"houses for the purposes contemplated, was within "the power of the Health Officer *and in aid "of the exercise of which the direction of the Col-"lector to make the transfer may have been legit-"imately given and executed;* and as the case is "now presented it must be so treated. It follows "that the charges for lighterage paid by Bartlett & "Co., according to the custom in such cases, and "for the storage in their Baltic Stores, for the time "the goods properly remained there, were a lien "upon the rags. But so far as the defendants re-"quired the payment of the further claim for disin-"fection as a condition of the delivery, they were "chargeable with duress of property" (p. 418, fol. 607).

After some further discussion as to the sufficiency of the verdict against Bartlett & Co. alone, with no verdict against Dr. Smith, the conclusion of the Court was announced that the judgment should be reversed and a new trial granted unless the plaintiff should stipulate to reduce the recovery of damages to $3,182.50, being the amount paid by plaintiffs Lockwood and McClintock for disinfection; and that in that event the judgment be so modified, and, as modified, affirmed (fol. 608, p. 419).

The stipulation was accordingly given, and judgment of affirmance entered as to the recovery of the sum stated (fols. 593 to 595, pp. 410, 411).

It will, therefore be seen that the only part of the recovery or judgment which was left standing, was the amount paid by plaintiffs Lockwood and McClintock to Bartlett & Co. for the alleged disinfection of their rags; and that the charges for lighterage, storage, cartage and labor were allowed on the ground that

the Collector under the law had authority to send the rags to Bartlett & Co.'s warehouse for storage, either as unclaimed merchandise or for the purpose of being disinfected, *but that no actual order for disinfection by the defendants Bartlett & Co.* or the disinfecting company *was ever given by the Health Officer*, as he very distinctly stated.

The decision therefore of the Court of Appeals, the highest court of the State in which a decision could be had, *was not against* the validity of any law or of any authority exercised by the Collector pursuant to any law of the United States, but was in support of such authority; and the decision and judgment against Bartlett & Co. for the amount of the charges for disinfecting the rags in question was based, not on any ground of want of authority or power on the part of the Collector, or even of the Health Officer, *but distinctly on the ground that, as a matter of fact, the Health Officer had not given any specific directions or orders for the disinfection of the rags by Bartlett & Co.*

This was purely a question of fact, the decision and determination of which by the State Court, this Court will not review or re-examine.

While the Health Officer stated, in a casual way, or as a matter of opinion to the Collector, that rags generally, including these rags, *ought* to be disinfected, and the Collector had thereupon ordered the rags to be sent to the Baltic Stores for disinfection, as suggested by the Health Officer, there was no order on the part of any one to disinfect them, or to Bartlett & Co. to perform this process of disinfection upon them, nor any sanction of the charges made by them for that purpose.

It is further to be noted, that before this process of disinfection was perpetrated upon the rags in question, all the circulars and orders of the Treasury Department, requiring such disinfection or authorizing the Collector to cause such disinfection to be

done or to have any control over it, were by the circular of June 10, 1885, rescinded and withdrawn; and the approval of the designation of Bartlett & Company's stores as a place for such disinfection was revoked; and the whole matter was at the time of this disinfection entirely under the control of the Health Officer of the port.

The New York Court of Appeals by its opinion and decision nowhere held or decided, as claimed by the plaintiffs in error in their assignment of errors, "that under the statutes of the United States the United States Government had no right to order the disinfection of the plaintiff's rags"; or that the Treasury Department or the Collector of the Port of New York had no right to order the disinfection of the rags. Nor did the Court hold that the rags were not disinfected by the authority or under the order of the United States Government, or the Treasury Department, or the Collector of Customs of the Port of New York, as stated in the 5th assignment of error.

The 6th, 7th, 8th and 9th assignment of errors do not set up or specify any decision by the New York Court of Appeals against the validity of a statute, or of an authority exercised under the United States, or against any right claimed under such statute or authority.

The 10th and 11th assignments of error are negative. They do not allege anything that the Court held or decided, to be error; but that it *did not hold* or decide certain *facts* to have been proved or to be as stated.

It is therefore quite apparent that in the decision of the highest Court of the State in which a decision could be had, there was, by the final judgment in this case no decision against the validity of any statute of the United States, or of an authority exercised under it; nor any decision against any

right, privilege or immunity set up or claimed under any statute or commission held, or authority exercised under the United States.

Fourth.

The Supreme Court will not review or re-examine the judgment or decision of the State Court upon questions of fact, which were exclusively within its jurisdiction; either as to what the Health Officer of the Port actually did in regard to the disinfection of the rags in question, or as to his power and authority in the premises, he being exclusively a State officer.

The New York Supreme Court and the New York Court of Appeals having both decided that *the Health Officer of the Port never, in fact, ordered the rags to be disinfected*, that fact must be regarded as settled in this Court beyond review or re-examination; and the sole power and authority to order or direct such disinfection having been also adjudged and decided to be in the Health Officer, it must be considered to be established beyond review that Bartlett & Co. had no right to disinfect the rags derived from any order or direction of the Health Officer.

The Court of Appeals so held and decided, and that decision is binding here.

In fact, the plaintiffs in error did not anywhere upon the trial of the action claim that the rags were disinfected by them by any other authority than the order of the Health Officer.

They did claim that they had a right to retain the goods until their claims for storage, lighterage and cartage were paid, because the rags were sent to their warehouse, as a bonded warehouse, by the

Collector of the Port, as unclaimed, or as subject to the control of the Collector (pp. 452 and 453, pp. 326 and 327).

They at no time claimed, or asked the Court on the trial, to hold or to charge that the Collector of the Port either had the right to order these rags to be disinfected, or that he did as a matter of fact order them to be disinfected.

Neither the Court of Appeals nor the New York Supreme Court at the trial, nor upon the appeal at General Term, held that the Collector of the Port, as a matter of fact, ordered, or did not order, the rags referred to to be disinfected by Bartlett & Co. or any one else.

Where the record shows upon its face that a Federal question was not *necessarily involved*, the Court will not go outside of it to the opinion or elsewhere, to be certain whether one was in fact decided.

Moore v. *Mississippi*, 21 Wall., 636.

In that case the Court by Mr. Chief Justice Wait said: "We are not required to re-examine the judgment of a State Court simply because a Federal question may have been decided. To give us jurisdiction it must appear that such a question was necessarily involved in the decision"

Murdock v. *Memphis*, 20 Wallace, 633.
Otis v. *Oregon S. S. Co.*, 116 U. S., 548.

In *Murdock* v. *Memphis*, 20 Wall., 590, this Court also held that while the second section of the Act of February 25, 1867, now Sec. 709 U. S. R. S., operated as a repeal of the 25th Section of the Judiciary Act of 1789, it was not intended that any other questions of Federal or other law than such as were involved in a decision of the State Court against a right set up under federal law should be considered by the Supreme Court.

And the Court further held, that it was essential to the jurisdiction of the Supreme Court over the

judgment of a State Court that it shall appear that one of the questions mentioned in the statute must have been raised and presented in the State Court, and that it must have been decided by the State Court *against* the right claimed or asserted by the plaintiff in error, or that such decision was necessary to the judgment rendered in the case.

And even if the claim of right under Federal law was erroneously decided, then the Court must further inquire whether there is any other matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

And in *Schuyler* v. *Bolling*, 150 U. S., p. 85, decided at the present term (October 30, 1893), this Court *held*, that "in order to maintain a writ of error against a judgment of the highest court of a State, it must appear that the judgment involved a decision against a right, title, privilege or immunity claimed by the plaintiff in error under the laws of the United States, which was specially set up or claimed at the proper time and in the proper way."

Citing also

Spies v. *Illinois*, 123 U. S., 131.
Brooks v. *Missouri*, 124 U. S., 394.
Texas, &c., Ry. Co. v. *Southern Pacific Co.*, 137 U. S., 48.

It is not enough to maintain the jurisdiction of the Supreme Court that the construction of an act of Congress was drawn in question, and that the decision was against the title of the party; but it must also appear that the title depended on that act.

Williams v. *Norris*, 12 Wheat., 117.
Ryan v. *Thomas*, 4 Wall., 603.

In *Rector* v. *Ashley*, 6 Wall., 142, it was held that whenever the judgment of the State Court can be sustained on any proposition found in the record, of which the State Court has exclusive jurisdiction, it will not be reversed because some point subject to re-examination in this Court was erroneously determined.

Fifth.

The final judgment or decree in this suit, based upon the decision of the Court of Appeals of the State of New York, cannot therefore be re-examined or reversed by the Supreme Court of the United States upon a writ of error; and the writ of error sued out in this case by the plaintiffs in error, Bartlett & Co., should be dismissed, or the judgment affirmed, with costs, and the ten per cent. penalty for delay, pursuant to Rule 23, Subdivision 2, of this Court.

FRANCIS LYNDE STETSON,
CHARLES W. BANGS,
Counsel for ~~Respondents~~ Defendants in Error.

Office Supreme Court U. S.
FILED.
MAR 30 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

IN ERROR TO THE SUPREME COURT
OF THE STATE OF NEW YORK

No. 712.

October Term 1893.

EDWARD B. BARTLETT, *et al.*,
Plaintiffs in Error,

vs

WILLIAM LOCKWOOD, *et al.*,
Defendants in Error.

BRIEF ON THE PART OF THE PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR, &c.

GOODRICH, DEADY & GOODRICH,
Attorneys for the Plaintiffs in Error.

WILLIAM W. GOODRICH,
Of Counsel.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

EDWARD B. BARTLETT, *et al.*,
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vs.

WILLIAM LOCKWOOD, *et al.*,
Defendants in Error.

No. 712.
October Term,
1893.

Brief for Plaintiffs in Error.

Upon motion to dismiss writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York.

This motion involves the authority of the Treasury Department to control the landing of infected rags, and the decision of this Court is therefore of the greatest public importance.

The brief of the plaintiffs in error on this motion is based upon two grounds :

1. That, by the issue raised by the pleadings, neither the validity of any statute of the United States, nor the validity of any authority exercised under the United States was drawn in question.

2. That the State Court did not decide against the validity of an authority claimed to be exercised under the United States.

First Point.

The pleadings raised such an issue.

The complaint alleged the wrongful and unlawful detention of the rags.

The answer denied that "the plaintiffs were entitled to the possession or control of the rags referred to in the complaint at the time alleged in the complaint, or that they would have had the same, except for any wrongful acts or conduct of these defendants" (R., fol. 568).

This general denial authorized the introduction of any testimony justifying the detention of the rags by the defendants.

This point has just been decided by the Court of Appeals at the February term in a case not yet in the books, but which is printed in the *New York Law Journal* of March 11, 1894, the case of Milbank against Jones, where the Court said: "Under a general denial, a defendant may contradict by evidence anything which the plaintiff is bound to prove in the first instance to make out his cause of action, or anything that he is permitted to prove for that purpose under his complaint."

Second Point.

The motion to dismiss on the opening of the plaintiffs' counsel shows that this question was one of the questions raised and assumed to be raised by the issues.

It is manifest from the opening of the plaintiffs' counsel (R., fol. 3), that such was his opinion when he stated that Bartlett was attempting to get the assistance of the United States

Government to promote his alleged conspiracy with Smith to disinfect the rags in question. Such was also the argument of the counsel for the defendants, when at folio 8 he made a motion to dismiss the complaint on the plaintiffs' opening on the ground that "this whole matter was under the control of the Custom House and subject to the conditions of the United States Treasury, and it was the United States officer who exercised authority over the importation of rags. The counsel has referred to that by saying that the Collector of the Port interfered."

It further appears by the argument of the plaintiffs' counsel of the motion to dismiss (R., fol. 10), when he said that one of the defendants "urged the Collector in writing to prevent the landing of these rags," and that his "machination resulted in the Collector holding the rags."

Third Point.

The same fact appears on the motion to dismiss at the close of the plaintiffs' case.

On the motion to dismiss, the defendants' counsel stated that the defendants were acting under the authority of the United States Government at Washington (R., fol. 126); that it appeared by the correspondence between the Collector and the Treasury Department "that the goods were sent to the warehouse, by order of the Secretary of the Treasury, to be disinfected, and that disinfection was ordered pursuant to these instructions" (R., fol. 127).

The attention of the Court was also called on this motion to Section 4792 of the United States Revised Statutes (R., fol. 137) which directs that

all officers of the United States shall faithfully aid in the execution of quarantine and health laws, as they may be directed from time to time by the Secretary of the Treasury, and the Court stated as follows: "But what I wanted to know was, whether your contention was that, that section itself gave the Secretary of the Treasury the power under the guise of sanitary regulations to substantially close the port" (R., fol. 138).

To this the defendants' counsel answered that the claim was made not only that the actual control was in the United States officers, but that, whether they exercised it or not, they had the power to do so (R., fol. 127).

The motion to dismiss was also based on the ground that "The physical control of these rags at the times alleged, between the 30th of May and the 17th of June, whether it be held legal or not, was in the Collector of the Port of New York, by whom the evidence shows the rags were sent to the Baltic stores for disinfection. In the case of the Battaglia, the supervision of the U. S. Treasury officers was not relaxed, and the disinfection at Robbin's Reef was approved by the Treasury Department" (R., fol. 143).

And on the further ground that "It follows, therefore, that the control of the disinfection of these rags, exercised by the United States authorities, was not only actual, but lawful, and, at all events, the directions of the Secretary of the Treasury were required to be observed under the statute" (R., fol. 145).

And on the further ground that "On January 8th, Collector Robertston communicated by letter to the Secretary of the Treasury his decision, wherein he states that he will order the goods when landed to be disinfected. Following that, on the very next day, comes this order that directs the goods to be taken to Bartlett's stores for disinfection." Now, that action of the Collector was taken

when he was governed by the conclusion of the person to whom the matter was referred by the Secretary of the Treasury upon whose action it depended, and who took the action set forth here in this letter which we have in evidence" (R., fol. 151).

Also, "that it was proven that the rags were ordered by Collector Robertson to the Baltic stores for disinfection under the orders of the Treasury Department of December 22d, 1884, and that the rags were in the possession of the Collector at the time alleged" (R., fol. 146).

The Court said: "I think there is no authority under the statutes, either in the law of this State or of the United States, for sending goods of this kind to a private individual to be treated," and the motion for a non-suit was denied (R., fol. 155).

The motion to dismiss the complaint was renewed at the close of the testimony. The Court stated: "That the acts of the government officials in ordering these goods to the warehouse to be disinfected were entirely outside of any authority conferred either upon the Collector of the Port or the Health Officer or any one else. That the taking of those goods against the protest of the plaintiffs to those stores, and subsequently holding them and refusing to deliver them without the payment of their charges was an act not authorized by law, and was entirely unjustified by any power conferred on either of those officers, and was a direct injury to the plaintiff's property" (R., fol. 439).

Fourth Point.

The same fact appears by the course of the evidence.

In the years 1884 and 1885, grave fears were en-

tertained in this county as to the introduction of the cholera, which was then prevalent in the East, and quarantine regulations were strictly ordered and enforced (R., fol. 227).

On August 30th, 1884, the United States Treasury Department prohibited the unloading of any old rags at any port of the United States for three months from that date (R., fol. 489).

On November 15th, 1884, the Secretary of the Treasury prohibited the unlading in the United States of old rags shipped after the 20th from foreign ports, except under restriction therein specified (R., fol. 550).

In December 1884, the Treasury Department issued an order as follows: "Old rags may be landed and stored at such places as may be approved by this department, for the purpose of undergoing any of the processes of disinfection above named, and upon the completion of such process to the satisfaction of an Inspector of Customs and the local Health Officer, the rags may be delivered to the importer or consignee (R., fol. 520)

On December 22d, 1884, the Treasury Department issued a circular directing that no old rags, except those afloat on or before January 1st, 1885, should be landed in the United States, except upon disinfection at the expense of the importers (R., fol. 558).

On January 12th, 1885, the Treasury Department designated the Baltic stores, owned by the defendants E. B. Bartlett & Company for the landing and storing of rags for the purpose of disinfection (R., fol. 560).

On January 12, 1885, the Treasury Department issued the following order to the Collector at New York: "When an entry is presented of rags which have not been disinfected, it should be accepted, but the permit to land should be coupled with condition that the rags are to be taken to the proper storehouse for disinfection, and

shall only be delivered therefrom upon a further permit to be issued by you in the nature of a delivery from warehouse, and upon the certificate of the inspector in charge of the store that the requirements of the circular have been complied with" (R., fol. 560, 561).

On January 14th, 1885, Collector Robertson issued an order directing that "On the entry of old rags shipped after January 1st, instant, and which have not been disinfected prior to importation, the permit to land will have written on the face thereof directions to the inspector to send the rags to the Baltic stores in Brooklyn by bonded lighters for disinfection" (R., fol. 542).

Charles F. Kane, on January 12, was appointed by the Secretary of the Treasury inspector of rags (R., fol. 369).

The rags by the Vigilant arrived on May 30th (R., fol. 12), and on that day Health Officer Smith issued a permit for the landing of the cargo, "rags excepted" (R., fol. 483).

The plaintiffs went to the Custom House to enter the goods, but the Collector declined to receive the entry or grant a permit (Rec., fol. 14). This application to enter the goods appears to have been made on the 1st or 2d of June (Rec., fol. 25).

McClintock, one of the plaintiffs, testified that interviews, in regard to the rags on the Vigilant, were held with the Secretary of the Treasury at Washington about the time of the arrival of the goods (R., fol. 12).

On June 3d, 1885, the Collector of the Port of New York issued a "general order to send merchandise to public store" to the inspector on board the ship Vigilant, allowing to be landed and sent to Public Store No. —, E. B. Bartlett's, south (these being the Baltic stores named in Collector Robertson's order), all merchandise for which no permit shall have been received by the inspector in charge of the ship (R., fol. 517*a*).

It will be observed that the permit for the landing of the goods by the Vigilant excepted rags, and it was for this reason that the Vigilant was sent to the Baltic stores to discharge the rags. The Baltic Stores (E. B. Bartlett's, south) is a bonded warehouse, and the United States storekeeper received and receipted for the rags of the Vigilant on June —— (Rec., fol. 517).

On June 6th, Collector Robertson addressed Health Officer Smith a letter, enclosing a telegram from the Treasury Department in reference to the rags by the Vigilant, and asked whether, in his judgment, the rags could be landed without disinfection with safety to the public health (R., 499). This telegram reads as follows:

"As to rags per Vigilant and Weissenhorn from Japan, which importers claim were mostly on board prior to January first, you are directed to submit all facts to Health Officer Smith, and to be governed by him in the matter."

On the same day Health Officer Smith answered the last letter of Collector Robertson, and at the request of the latter stated: "It seems therefore advisable that for the present the rule of disinfection of rags should be general, and that for reasons which have been set forth the rags on the Vigilant * * * * should not be an exception to the rule" (R., fol. 497).

On June 8th, 1885, Mr. Robertson, the Collector, wrote the Secretary of the Treasury, in which he stated that he had received from the health officer of the port the communication of June 8th, and that, "governed by his conclusions, I shall, as directed by you, order the rags, when landed, to be disinfected" (R., fol. 551).

The goods by the Vigilant were received in the Baltic stores on June 13th, 1885, as shown by Exhibits 41 to 47 (R., fol. 546), and were receipted for

by C. F. Kane, U. S. Inspector of Rags, as shown by Exhibits 48 to 56 (R., fol. 547).

On June 16th, 1885, the Collector wrote the U. S. District Attorney, informing him that a suit (not this suit) had been commenced against himself, as Collector, to enjoin him in his official capacity from disinfecting the rags of the Vigilant, and in that letter the Collector states as follows: "My action in that matter was based upon the direction of the Secretary of the Treasury and the advice of the health officer, by whose advice the Secretary directed me to be governed in this particular case" (R., fol. 553).

On June 10th, the Secretary of the Treasury issued a circular directing that all old rags thereinafter imported from foreign countries should only be admitted to entry at the Custom House upon the production of permits from the health officer at the port of importation, and directing all vessels carrying old rags to be detained at quarantine, subject to the order of the proper health authorities at the port of destination (R., fol. 498).

On July 18th, 1885, the Collector of the Port of New York wrote a letter to E. B. Bartlett & Co., in which he said: "In the matter of the imported old rags *ex* Vigilant sent to Baltic stores for disinfection, and subsequently stored in your bonded warehouse as unclaimed, &c." (R., fol. 539).

Fifth Point.

The same fact is shown by the charge of the learned Judge at the trial.

The defendants' counsel asked the Court to charge that these goods could not have been taken from the custody of E. B. Bartlett & Co., without the

sanction of the United States Collector and the United States Treasury Department (R., fol. 472). And that the defendants could not be held liable if the goods were sent to a bonded warehouse by the order of Collector Robertson or the Treasury Department (R., fol. 453).

The Court refused to charge as requested, and the defendants excepted.

Sixth Point.

The General Term in its opinion stated the same position.

The Court held as follows:

"On the 3d of June the Collector directed all goods upon this vessel (the Vigilant), for which no permit shall have been received, to be sent to the Baltic Stores, kept by E. B. Bartlett & Co. (R., fol. 583). * * * The main question, then, which is presented by this appeal is, were all the proceedings, by which the charges claimed by Bartlett & Co. were incurred, without authority of law? It is sought to justify the action of the Collector because of the provisions of the Revised Statutes of the United States, which authorize the Collector to take possession of unclaimed merchandise and store the same in any private bonded warehouse, such as the Baltic Stores * * * (R., fol. 584).

"Where the owner was claiming possession of his property, demanding a permit for the landing, it being confessedly free and not liable to duty, it seems to have been the duty of the Collector to have granted the necessary permits, and his seizure of the goods and the causing of them to be lightered to the Baltic Stores was an unauthorized act, and for the expenses incurred in the performance of that

act certainly no person could be allowed to hold the goods from their owner. Neither can the acts of the Collector be justified by sections 4792 and 4793 of the statutes" (R., fol. 585). * * *

"The Collector having no power to send any but unclaimed goods to the public stores, as has been seen, could not refuse a permit for these goods to land and cause them to be sent to the public stores to be disinfected at the expense of the owner; and if he did so, he as well as all other persons who detained the goods because of the non-payment of these unauthorized charges became liable in damages for such unauthorized detention" (R., fol. 586).

"The act of the Collector was entirely unauthorized, and hence his official character was no shield. The act of the Collector in the case at bar being without authority, such act could confer no authority upon Bartlett & Co. to hold the goods until the charges incurred because of the unauthorized acts of the Collector were paid."

"It cannot be said that Bartlett & Co. did not have control of these rags because goods in bonded warehouses are in the custody and control of the Collector" (R., fol. 587).

Seventh Point.

The Court of Appeals, in its decision, declared to the same effect.

"The defense was founded upon the alleged right through the authority derived through the United States Treasury Department, the Collector and Health Officer of the Port of New York" (R., fol. 597).

"By circular issued by the Secretary of the

sanction of the United States Collector and the United States Treasury Department (R., fol. 472). And that the defendants could not be held liable if the goods were sent to a bonded warehouse by the order of Collector Robertson or the Treasury Department (R., fol. 453).

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"By circular issued by the Secretary of the

Treasury in November, 1884, the unlading of rags from infected ports (amongst which were classed France, Italy and all Mediterranean and French ports) was prohibited; and it was directed that no old rags should be landed at any port of the United States except on a certificate of the U. S. consular officer at the port of departure, that they were not gathered or baled at or shipped from any infected place or any region contiguous thereto, and that the order would not be construed to allow the unlading of any old rags except upon the usual permit of the local quarantine or health officers. This circular, directed to officers of customs and others, was in harmony with the regulations of the Health Office, and in aid of their enforcement" (R., fol. 601).

"The collector under his authority, in view of the regulation for disinfection of the rags on the two vessels adopted by the health officer, was justified in directing, as he did, the sending of the rags to those places, and the expenses of such transfer were presumptively a lien upon the property to which they related. No specific order or direction of the health officer is essential for that purpose. It is sufficient that it was done pursuant to regulations, within his power, made by him" (R., fol. 606).

"It follows that the charges for lighterage paid by Bartlett & Co., according to the custom in such cases, and for the storage in their Baltic stores, for the time the goods properly remained there, were a lien upon the rags. *But so far as the defendants required the payment of the further claim for disinfection as a condition of the delivery, they were chargeable with duress of property*" (Rec., fol. 607).

In other words, the Court held that the Collector had no right to direct the holding of the rags for the expense of disinfection, even though they were disinfected by the general orders of the health

Officer in aid of whom the Collector had ordered that the goods should not be landed without disinfection.

Eighth Point.

The rags were held by authority of the United States and were in its possession.

It is conceded that the Revised Statutes, Sections 4792 and 4793, direct all officers of the United States to aid in the execution of all quarantine and health laws of the several States, and direct the Collector to grant his permit for the unloading and discharging of cargoes under the care of an inspector to be appointed by him.

Sec. 4792. "The quarantines and other restraints established by the health laws of any State, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States, by the masters and crews of the several revenue cutters and by the military officers commanding in any part or station upon the seacoast; and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective precincts, and as they shall be directed, from time to time, by the Secretary of the Treasury."

In the Treasury Department circular of January 12th, 1885, it is ordered as follows: "Where rags requiring disinfection form part of the cargo, they will be placed on lighters as fast as discharged, and the lighter loads will be taken to the place above designated" (Baltic Stores) (R. fol. 560).

It becomes important, therefore, to inquire whether the health officer of the port directed the

disinfection of the rags in question. The brief of the defendant in error cites the following testimony of Health Officer Smith:

"Q. Did you ever give any orders for the disinfection of old rags of the Vigilant or Battaglia, and if so, when and where? A. I don't remember to have given any.

Q. I ask you whether you ever gave an order for the disinfection of the rags on the Battaglia or the Vigilant? A. No, sir, I never did" (R., fols. 244, 245).

These sentences, taken by themselves, would seem to indicate that the health officer never gave any orders whatever for the disinfection of the rags by the Vigilant and the Battaglia, but a reference to the testimony shows that Dr. Smith was speaking of a specific order for the specific disinfection of the rags by these particular ships, therefore I quote the testimony of Dr. Smith, which shows that while he gave no specific orders for the disinfection of the rags by the Vigilant and Battaglia, he had given such general orders as included the disinfection of the rags of all vessels.

It appears by Exhibit 1 (R., fol. 492) and Exhibit 26 (R., fol. 533), that he certified that the rags by Battaglia were "to be disinfected at Robbins Reef if the Health Commissioner of Brooklyn will not give permit for Baltic Stores," while on the same certificate Dr. Raymond, the Health Officer of Brooklyn, certified that inasmuch as there is no evidence that these rags are not infected, they cannot be discharged in Brooklyn until they bring the usual certificate from the health officer.

The health officer testified:

"Q. Did you know at the time that the quarantine pass was given for the Vigilant with the words upon it "Rags excepted," that the Baltic Stores had been designated as a place of disinfection, and that the rags could not be landed except at the

Baltic Stores, and *through the process of disinfection?* A. I did.

By the Court:

At the time you wrote this letter to the Collector, in which you stated that these rags could not be landed with safety to the public health, were you aware that the Collector had ordered that these Baltic Stores should be designated as the place of disinfection? A. Yes, sir.

Q. And were you aware at the time that they were to go to the Baltic stores? A. I knew of no other place where they could go" (R., fol. 255).

Dr. Smith further testified:

"Q. Did you ever write any letter to the Collector about any rags except those rags on the Vigilant and the Battaglia? A. I don't remember now.

Q. Do you still believe and do you still declare that it is necessary for the public health that all these rags should be disinfected? A. I do (R., fols. 325, 326).

Q. Do you mean to say that you wrote this letter (Ex. L., fol. 493) without intending that it should operate to have the rags disinfected? A. It was to advise the Collector as he requested.

Q. Was it to advise him to have the rags disinfected? A. It was that they should not not be excepted.

Q. And you knew when you wrote that letter, that if they were disinfected they would have to be disinfected in the Baltic Stores? A. I didn't know of any other place.

Q. Did you know that if they were disinfected they would have to be disinfected in the Baltic Stores? A. I knew that would be the only place" (R., fol. 327).

Q. Let us hear your answer again, then? A. I said that I felt a responsibility to carry out the conclusions of that conference (Fifth Avenue Hotel

conference) when the Battaglia arrived, that I had not felt when the Exile arrived (R., fol. 333).

Q. And still you ordered the Battaglia to be disinfected? A. I don't say I ordered her to be disinfected.

Q. Did you not write upon the little red or yellow pass that she was to be taken to Robbins Reef in case she did not get admission for disinfection? A. I don't remember the form, but *I think it is the regular certificate to be disinfected.*

Q. And you knew the effect of that certificate would be to cause her cargo to be disinfected so far as the rags were concerned. Did you not, notwithstanding the certificate, and the consular certificate, and the manner in which you directed the rags that arrived by the Exile when the Battaglia came to the port, by that certificate ,direct her cargo to be taken to Robbin's Reef for disinfection? It was a certificate of discharge? A *I know the result of that would be that they were to be disinfected.*

Q. And you knew that Mr. Bartlett or the Paper Stock Disinfecting Company would do the disinfecting down there? A. I do not know that Mr. Bartlett had anything to do with it.

Q. Yow knew that the Paper Stock Disinfecting Company had? A. I knew that that was the only process for disinfecting (R., fol. 338).

Q. Had you any reason to believe that there was any infection in these rags? A. I had reason to believe so. I had reason to believe that there was infection, which is liable to exist in all baled rags. They are gathered promiscuously and not cleansed.

Q. Did you not know that Dr. Raymond had made a regulation which would prevent the landing of those rags in Brooklyn if there was danger of infection from any cause whatever? A. I knew he made a regulation that I should certify that they were not from infected ports." (R., fols. 322, 323.)

McClintock, one of the plaintiffs, testified in regard to an interview between him and Dr. Smith as follows:

I went there and asked him whether these rags on the Battaglia had been stopped. He said: "Why, everything has to be disinfected." I said: "But they have got the certificate that you require." "Well," he said, "they have to be stopped." I talked a little harshly to him because I felt outraged, and he jumped up and said I had my remedy; and I told him I knew it and proposed to take it. I asked him where he had ordered the goods on the Battaglia to be taken. He said that he hadn't ordered them to be taken any place; that he hadn't any authority. He had merely said that they ought to be disinfected. (R., fol. 34.)

It seems to me, therefore, that the real meaning of the testimony of Dr. Smith, before cited, that he gave no special order for the disinfection of the rags on the Battaglia and Vigilant, when taken in connection with the other evidence cited, is simply a statement that he gave no special orders for the disinfection of the rags of the Vigilant and the Battaglia, but that he had given general orders for the disinfection of all rags, and had forbidden the landing of any rags unless they were disinfected under the orders of the Treasury Department, because it followed that under the general order to disinfect all rags no special order was necessary for the Vigilant and Battaglia.

The plaintiff in error has assigned as error the following (R., fol. 609):

2d. That the Court held that under the statutes of the United States, the United States Government had no right to order the disinfection of the plaintiffs' rags.

3d. That the Court held that under the statutes of the United States the Treasury Department had

no right to order the disinfection of the plaintiffs' rags.

4th. That the Court held that under the statutes of the United States the Collector of the Port of the New York had no right to order the disinfection of the plaintiff's rags.

5th. That the Court held that the rags were disinfected by the authority and under the order of the United States Government or the Treasury Department or the Collector of Customs of the Port of New York.

8th. That the Court held that a specific order from the Health Officer of the Port of New York for the disinfection of the particular goods on the Vigilant was necessary, inasmuch as it appeared by the evidence that general orders were given by him for the disinfection of all such goods, and that under such orders the rags by the Vigilant were disinfected without specific orders as to that particular cargo.

Ninth Point.

The Collector and E. B. Bartlett & Co. were entitled to hold the rags till the lighterage and warehouse charges were paid.

This has no relation to the disinfecting charges which the Court held were not a lien.

The Court of Appeals held as follows :

" The Collector, under his authority, in view of the regulations for disinfection of the rags on the the two vessels, adopted by the Health Officer, was justified in directing, as he did, the sending of the rags to those places, and the expenses of such transfer were presumptively a lien upon the prop-

erty to which they related. No specific order or direction of the Health Officer is essential for that purpose ; it is sufficient that it was done pursuant to regulations within his power made by him " (R., fol. 606).

No tender of the amount of these expenses, that is, of lighterage and warehousing, being the amount for which the Court held that E. B. Bartlett & Co. had a lien as warehousemen and as having paid the lightermen, is either alleged in the complaint or proven at the trial, and no tender was made until October 9, 1885 (R., fols. 30 and 165), and until such tender was made the Collector and E. B. Bartlett and Co. were in the lawful possesion of the goods under the authority conferred upon the Collector by the United States statutes, and upon E. B. Bartlett & Co., the proprietors of the bonded warehouse, to whom the goods were sent by the order of the Collector.

Tenth Point.

The rags were in a bonded warehouse, and, therefore, in the custody of the United States.

It is necessary to call the attention of the Court to the provisions of the statute in regard to bonded warehouses. Section 2960 provides that private warehouses shall be previously approved by the Collector and placed in charge of an officer of customs, who, together with the owner of the warehouse, shall have the joint custody of all the merchandise stored in the warehouse, and that the labor on the merchandise so stored must be performed by the owner of the warehouse under the supervision of the officer. Section 24, Chapter 391,

U. S. Statutes of 1874, provides that the Secretary of the Treasury shall from time to time make regulations in regard to the conduct and management of bonded warehouses and imported merchandise therein.

Section 2965 of the U. S. Revised Statutes requires payment for all charges for labor and storage and other expenses accruing upon merchandise sent under "general order" to bonded warehouses, and the owner of the bonded lighters upon which the rags were transferred to the warehouse complained to the Collector that Bartlett & Co. had refused to pay his lighterage or assume the expense of the transfer. The Collector thereupon wrote E. B. Bartlett & Co., the letter of July 18 (R., fol. 539).

We therefore claim that the rags in question were in the legal, actual, manual and physical possession of the United States Government and of the Collector of the Port of New York. The Collector "declined to allow the plaintiffs to enter the rags" (R., fol. 14) and took the rags into his possession as unclaimed merchandise (R., fol. 539), the plaintiffs having made no entry of the goods or received any permit in accordance with the United States laws, and they were sent by the Collector to a bonded warehouse. The fact that the bonded warehouse was leased by E. B. Bartlett & Co. is a mere incidental circumstance, which makes no difference in the fact that the Government had the legal and manual possession of the goods. They could not be delivered from the warehouse without the authority of the Collector; the Collector could remove them from that warehouse to such other place as he saw fit; the defendants, E. B. Bartlett & Co., could neither remove the goods to another of their warehouses, whether bonded or not, nor deliver them to any person without the entry of the goods by the plaintiffs and the order or permit of the Collector upon

such entry for the delivery of the goods to the owner.

Any demand of the plaintiffs, therefore, upon E. B. Bartlett & Co. for the possession of the goods either with or without a tender of the sum due, was ineffectual and the defendants never detained the goods after the plaintiffs had complied with the law, which requires the entry of goods at the Custom House, the obtaining of a permit for their delivery, and the payment of the charges incurred by orders of the Collector for lighterage, storage, etc.

"Under the Act of March 13, 1841, as well as by the subsequent acts of Congress upon the same subject, private bonded warehouses are public storehouses, and Collectors are authorized to retain, as part of their emoluments, sums received for the deposit of importations in such bonded warehouses under the same provisions applicable to public storehouses."

The U. S. *vs.* Macdonald, 2 Cliff., 271.

Goods deposited in such warehouses are in the custody and control of the Collector.

Clark *vs.* Peaslee, 1 Cliff., 545,454.

"Whether deposited in the public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit in writing under the hand of the Collector and naval officer of the port. Custody and control were the same, whether the merchandise was deposited in a public or other storehouse; and whether in the one or the other, the expenses of safe-keeping were to be paid by the importer or his agent. The importer and the proper revenue officer might agree upon a storehouse, as a place of deposit, other than one owned or then held under lease by the United States; but as soon as the mer-

chandise was deposited in the storehouse, and the locks of the inspector were affixed to the doors, it became a public storehouse for the purpose of securing the goods under the warehouse system."

U. S. *vs* Macdonald *et al.*, *ante.*

Eleventh Point.

The rags by the Battaglia stand in a somewhat different position from the rags on the Vigilant.

She arrived in New York June 6th, with 150 bales belonging to the defendants in error. On June 9th a general order was made by the Collector, permitting the discharge of the Battaglia's cargo, omitting rags (R., fol. 543). On June 13th the Collector addressed Health Officer Smith a letter, revoking the designation of the Baltic Stores for the disinfection of old rags (R., fol. 544). On June 19th the Collector issued an order directing the unloading of the rags of the Battaglia and their transfer by bonded lighter to Robbin's Reef for disinfection under Section 2880 of the U. S. Revised Statutes (R., fol. 533). They were transferred in bonded lighters, and this course was taken because the Health Officer of Brooklyn refused permission for the entry of the rags into Brooklyn (R., fol. 533).

On June 27th the Collector gave a permit for the landing of the rags by the Battaglia "to be sent to the appraiser's stores" (R., fol. 491).

On June 17th the Health Officer issued a certificate directing the 150 bales to be disinfected at Robbin's Reef (R., fol. 492).

On June 19th Collector Robertson wrote the Treasury Department that he had ordered the rags by the Battaglia to be disinfected at Robbin's Reef

unless the Brooklyn Commissioner of Health would allow them to be disinfected at Baltic Stores, and that such Commissioner had refused to allow the landing in Brooklyn, and that he had therefore ordered the unloading of the rags and their transfer by bonded lighters to Robbin's Reef for disinfection (R., fol. 533).

On June 10th the Treasury Department revoked its order prohibiting the landing of imported old rags, and directed that the old rags should be admitted to entry at the Custom House only upon the production of permits from the Health Officers at the ports of importation, duly authorizing the landing of the same, and that vessels carrying old rags should be detained and held by the quarantine officers and held subject to the order of the proper health authorities.

On June 11th the Treasury Department directed the Collector that the Battaglia's rags should be governed by the circular of the 10th, provided the Health Officer should permit it (R., fols. 543, 546).

The assignments of error in regard to this cargo is as follows (R., fol. 611):

9th. That the Court held that a specific order from the Health Officer of the Port of New York for the disinfection of the particular goods of the Battaglia was necessary, inasmuch as it appears by the evidence that general orders were given by him for the disinfection of all such goods, and that under such order the rags by the Battaglia were disinfected without specific orders as to that particular cargo.

10th. That the Court did not hold that the rags upon the Battaglia were sent to Robbin's Reef and there disinfected by the order of the Collector of the Port of New York and the order of the Health Officer of the Port of New York.

The Court of Appeals stated that the Battaglia's rags were taken by lighters to Robbins Reef, a

place in quarantine designated by the Health Officer, for disinfection. The specific reference made to the regulations, orders and directions of the Health Officer and Treasury Department, and the execution of them directed by the Collector, sufficiently show the manner in which the authority was given, assumed and exercised in taking the possession of the rags for the purposes there indicated; and whatever the Secretary of the Treasury, and through him the Collector, was lawfully permitted to do in that respect, was in aid of the Health Officer and in observance of the Health Laws of the State. The direction of the Collector that the rags be sent to the places where they were taken from the vessel, was pursuant to the regulation or requirement that they should be disinfected, and it may be said to have been given pursuant to direction from the Secretary of the Treasury and in aid of the Health Officer in the execution of his official power by the observance of the regulations made by him in that behalf (R., fol. 604).

Twelfth Point.

We claim, therefore, the right to have this Court review the question whether the Secretary of the Treasury and the Collector at New York, acting under his orders, have the right to prevent the landing of infected rags and their delivery to the owner until they have been disinfected.

We insist that the United States officers are clothed with this power under the statutes of the United States.

That this power to prevent the landing of old rags until disinfected is vested in the Treasury Department, independently of the further question whether the disinfection is done by the orders of the health officer at New York.

But when it is also shown that the rags were disinfected by the general orders of the Health Officer and that the Collector acted in aid of that officer in ordering the holding of the goods for disinfection, it becomes clear that the goods were held and disinfected by authority of the Collector of the Port of New York.

Thirteenth Point.

This Court, in the case of Twitchell *vs.* The Commonwealth (7 Wall., 321), held that "writs of error to State Courts are not allowed as of right. The practice is to submit the record of the State Court to a Judge of this Court, whose duty it is to ascertain, upon examination, whether any question cognizable here upon appeal was made and decided in the proper Court of the State, and whether the case upon the face of the record will justify the allowance of the writ"

The presiding Justice of the General Term of the N. Y. Supreme Court endorsed upon the writ of error the words, "Appeal allowed, let writ of error issue. New York, February 11th, 1892. C. H. Van Brunt, Presiding Justice, Supreme Court, General Term, First Department" (R., p. 2).

The learned Chief Justice of this Court, on the following day (February 12th), after examination of the record, allowed the issuance of the writ (R., p. 1).

Therefore it appears that both the presiding Justice of the General Term of the N. Y. Supreme Court, which had previously decided the case, and also the learned Chief Justice of this Court, have decided that *prima facie* the allowance of the writ was proper.

It can hardly be said under these circumstances that the appeal is frivolous within the meaning of the 6th rule.

Fourteenth Point.

The motion to dismiss should be denied, and the question of jurisdiction ordered to be heard in connection with the hearing on the merits if the defendants in error desire it, in accordance with the 6th rule.

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